No.

In the Supreme Court of the United States

DENISE MARIE HENDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Fourth Amendment of the United States Constitution protects citizens from unreasonable search and seizure and requires that warrants describe items to be seized with particularity. The question presented is, where a magistrate ruled that the search warrant at issue was overbroad, did the Court of Appeals for the Eighth Circuit correctly determine that the "good faith exception" to the warrant requirement (*U.S. v. Leon*, 468 U.S. 897 (1984)) applies to the seizure of all of Petitioner's computers and hard drives when the warrant failed to specify what items were to be found within such devices? This presents a compelling question on a matter of exceptional importance under the federal constitution because there is a split among the Eighth and Tenth Circuits (*U.S. v. Leary*, 846 F.2d 592 (10th Cir. 1988)) as to the interpretation and application of the "good faith exception" to the warrant requirement.

2. The doctrine of primary jurisdiction requires that, in cases where an administrative regulation is at issue, courts defer to the expertise of an administrative agency. *U.S. v. Western Pac. R. Co.*, 352 U.S. 59, 63 (1956). The question presented is, in light of Petitioner being convicted of making false statements and omissions in order to obtain benefits to which she was not *entitled* in connection with her application for Social Security Disability Insurance ("SSDI") benefits, should the district court have deferred to the Social Security Administration's ("SSA") pending determination of eligibility before permitting the criminal trial to proceed? This is a compelling question of exceptional importance because, without clear guidance on the issue of primary jurisdiction as it relates to the SSA, persons who are ultimately found to be eligible for SSDI benefits could be placed at risk of criminal prosecution prior to an administrative finding of entitlement to benefits.

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are as follows:

1. Denise Marie Henderson, Petitioner
2. United States of America, Respondent

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Denise Marie Henderson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., A-1) is reported at 416 F.3d 686. Because the district court criminal proceedings resulted in a jury verdict, there are no reported or published lower court opinions. However, the relevant opinions are included in the Appendix. *See* Judgment in a Criminal Case, *United States of America v. Denise Marie Henderson,* Criminal File No. 03-437 (DSD/JSM) (D. Minn. 2004) (App., A-14); Report and Recommendation of Magistrate, *United States of America v. Denise Marie Henderson,* Criminal File No. 03-437 (DSD/JSM) (D. Minn. 2004) (App., A-23); Order of District Court dated July 19, 2004, *United States of America v. Denise Marie Henderson,* Criminal File No. 03-437 (DSD/JSM) (D. Minn. 2004) (App., A-78).

GROUNDS FOR INVOKING JURISDICTION OF THE U.S. SUPREME COURT

On August 1, 2005, Eighth Circuit Court of Appeals entered judgment affirming the district court's conviction of Petitioner Denise M. Henderson. (App., A-13). On September 19, 2005, the Court of Appeals denied Petitioner's petition for rehearing. (App., A-92). Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

This case involves the conviction of Petitioner Denise Marie Henderson ("Henderson") on the basis of, *inter alia*, computer-based evidence that was seized from her residence pursuant to a search warrant.

On February 25, 2003, federal agents executed a search warrant on Petitioner Henderson's residence, seizing computer hard drives and disks. Item 14 of the Federal Search Warrant permitted officers to seize: "Records which appear on any and all computers which are located in the house, to include the hard drive and any disks which are located in the house." (App., A-83 to A-85 at ¶ 14).

Prior to trial, Henderson moved to suppress all items seized pursuant to Item 14. On June 30, 2004, Magistrate Jamie S. Mayeron issued a Report and Recommendation finding the warrant used to obtain these computer records

overbroad. (App., A-50 to A-55). Nonetheless, Magistrate Mayeron held that the warrant's deficiency as to specificity was cured by the "good faith" exception set forth in *United States v. Leon,* 468 U.S. 897, 923-24, 104 S.Ct. 3405, 3421 (1984). The computer-based evidence used to convict Petitioner Henderson related to businesses owned and operated by Henderson's husband, e-mail messages regarding beauty pageants, and an e-mail in which Henderson jokingly likened herself to the "Energizer Bunny." These items of evidence were presented to the jury by the prosecution in the course of trial, in order to show that Henderson engaged in substantial gainful activity and was capable of engaging in substantial gainful activity while collecting SSDI benefits.

On August 1, 2005, the Eighth Circuit Court of Appeals entered judgment affirming the district court's conviction, in part on evidence seized pursuant to the warrant. *U.S. v. Henderson*, 416 F.3d 686 (8th Cir. 2005). In upholding the district court's denial of Henderson's motion to suppress computer-based evidence seized pursuant to an overbroad search warrant, the Court of Appeals held that:

> The warrant stated that police could search, "Records which appear on any and all computers which are located in the house, to include the hard drive and any disks which are located in the house." After finding the warrant overly broad, the district court relied on the good-faith exception in *United States v. Leon,* 468 U.S. 897, 923-24, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The court found that the police had probable cause for the search, there was no evidence of bad-faith or a biased magistrate, and the officer who requested the warrant was the same officer who executed it. Finally, **in the context of the rest of the warrant, the officer had a reasonable belief that warrant was limited to the seizure of**

> **computer files and drives related to Henderson's business activities, finances and disability**. *See United States v. Saunders*, 957 F.2d 1488, 1491 (8th Cir. 1992). The district court's findings are not clearly erroneous.

Henderson, 416 F.3d at 695 (emphasis added). On September 19, 2005, the court of appeals denied Henderson's petition for rehearing. (App., A-92).

The Tenth Circuit Court of Appeals has interpreted the "good faith" exception of *Leon* more narrowly, refusing to permit executing officer wide latitude in seizing items pursuant to overbroad warrants. *See U.S. v. Leary*, 846 F.2d 592 (10th Cir. 1988); *Voss v. Bergsgaard*, 774 F.2d 402 (10th Cir. 1985).

Because there is a conflict between the Eighth Circuit and Tenth Circuit as to the interpretation and application of the *Leon* "good faith" exception to the warrant requirement, review on certiorari is appropriate.

The criminal prosecution of Henderson by the Government took place while determination of her eligibility for SSDI benefits was still pending. Following a car accident, Henderson had been declared eligible for SSDI on February 24, 1999. On August 19, 2004, the SSA re-opened the case *sua sponte* and reversed the initial determination of eligibility. Henderson appealed that ruling. With the appeal pending, there was no final determination of Henderson's eligibility by the SSA when, on December 16, 2003, the government initiated the criminal prosecution of Henderson.

The doctrine of primary jurisdiction serves to "promot[e] the proper relationships between the courts and administrative agencies charged with regulatory duties." *Western Pac. R. Co.*, 352 U.S. at 63. There is currently no guidance from this Court as to the relationship between the SSA, which is charged with determination of eligibility for

SSDI benefits, and the Government as criminal prosecutor of social security fraud. The Government, in this case, used criminal prosecution to collaterally attack on administrative ruling of SSA. In doing so, the Government undermined the uniform application of SSDI determinations, and constitutes a compelling reason for review on certiorari.

ARGUMENT

I. THE CONFLICTING INTERPRETATIONS OF THE "GOOD FAITH" EXCEPTION TO THE WARRANT REQUIREMENT BETWEEN THE EIGHTH CIRCUIT AND THE TENTH CIRCUIT PRESENT A COMPELLING REASON FOR REVIEW ON CERTIORARI OF THIS MATTER OF EXCEPTIONAL CONSTITUTIONAL IMPORTANCE.

A. Evidence Seized Pursuant to a Warrant Later Found Invalid May Be Admitted Only Under Limited Circumstances.

The Fourth Amendment to the U.S. Constitution requires that items seized be described in a warrant with specificity. *See, e.g., Dalia v. U.S.*, 441 U.S. 238, 256 (1979) (citing *Stanford v. Texas*, 379 U.S. 476, 485 (1965)). Failure to do so requires suppression at trial of evidence so seized. *Illinois v. Krull*, 480 U.S. 340, 347 (1987).

The Supreme Court first crafted the "good faith" exception to the requirement of a constitutionally valid warrant in *U.S. v. Leon*, 468 U.S. 897 (1984). The exception provides for the admission of evidence obtained pursuant to a warrant later found *in*valid if the officer who executed the warrant objectively relied on the sufficiency of the search warrant. *Id.* at 922. The *Leon* Court, however, also set out limits to that exception. Among them, the Court warned that "a warrant may be so facially deficient – *i.e.*, in failing to particularize [...] the things to be seized – that the executing officers cannot reasonably presume it to be valid." *Id.* at 923.

B. The Eighth and Tenth Circuits Are in Conflict in Interpreting the Scope of the Good Faith Exception.

In the twenty years since *Leon*, the Circuits have split as to the discretion vested in the executing officer to determine in good faith whether the warrant is constitutionally valid. Thus, the Eighth Circuit and the Tenth Circuit are in conflict in defining whether a warrant so fails to meet its particularity requirement that the executing officers cannot reasonably presume to rely on it. In the instant proceedings, this Court upheld the admissibility of the evidence based upon a finding that "the officer had a reasonable belief" that the search was limited to business and financial records relevant to Henderson's representations to the Social Security Administration ("SSA"). *Henderson*, 416 F.3d at 695. Implicit in this standard is that the executing officer is charged with broad discretion to determine which records evidence violations of a given federal statute. This would leave the State free to conduct a general search in direct violation of the Fourth Amendment, *Lewis v. U.S.*, 385 U.S. 206, 211 (1966), and later determine which of the document is or isn't evidence of a crime. Therefore, here, the executing officer could not have reasonably relied on the warrant because it contained no indication as to which files on Henderson's computers were to be seized.

In contrast, the Tenth Circuit has rejected evidence obtained pursuant to warrants giving the executing officers such wide latitude. *See U.S. v. Leary*, 846 F.2d 592 (10th Cir. 1988). *See also, e.g., Voss v. Bergsgaard*, 774 F.2d 402 (10th Cir. 1985). Just as in this case, the warrant in *Leary* authorized seizure of business records. *Leary, 846 F.2d* at 600. Unlike the warrant in this case, which contained no particularity about the records to be seized, the warrant in *Leary* did contain one additional restriction: it specifically directed the officers to seize documents relating to the

violation of federal export laws. *Id.* at 600-01. Nonetheless, that court excluded the seized evidence. *Id.* at 609. In a subsequent elaboration, the Tenth Circuit required that the warrant itself, not the officer's judgment, be the instrument to "distinguish between items that may and may not be seized." *U.S. v. Le*, 173 F.3d 1258, 127[illegible] (10th Cir. 1999).

The court in *Leary* expressly rejected application of the good faith exception on the facts of that case, citing *Leon*'s "so facially deficient" limit to the exception. *Leary*, 846 F.2d at 607-609 (citing *Leon, supra*). The Tenth Circuit also relied on reasoning from the Ninth Circuit, stating that an executing agent must "take every step" to insure that the warrant is "as particular as the information available would allow." *Id.* at 607 (citations *U.S. v. Crozier*, 777 F.2d 1376, 1382 (9th Cir. 1985)) (internal quote marks omitted).

This stands in contrast to the Eighth Circuit's application of the good faith exception in this case, where an application of the Tenth Circuit's interpretation of *Leon* would have led to a vastly different result. Namely, all computer-based evidence seized from Henderson's residence, including numerous e-mails, business records, and financial documents, would have been suppressed for the very fact that the warrant failed to distinguish between electronic files subject to, and excluded from, seizure by the executing officers. Indeed, the officers used the overly broad warrant to seize every computer-based electronic file without discrimination, including communications belonging to non-parties and documents that had no relation to the charges at issue. The warrant was so facially overbroad that it could not have been relied on in good faith, and the electronic items seized should have been suppressed.

C. The Inter-Circuit Conflict Presents a Question of Exceptional Importance.

Inter-Circuit conflicts are evidence of a compelling reason to grand Certiorari, U.S. Sup. Ct. R. 10(a), because the rights and duties of the parties should not depend upon where the case is litigated or the alleged criminal conduct occurs. *See* Advisory Committee Notes to the 1998 Amendments, Fed. R. App. P. 35 (which also recognizes 'Circuit splits' as ground for extraordinary review). It follows that the conflict described above presents such a compelling reason. From the guidance issued by the Eighth Circuit in *Henderson*, 416 F.3d 686, it is probable that identical evidence obtained under an identical warrant would have been excluded in the Tenth Circuit.

The exclusionary rule is a remedy to a violation of a defendant's Fourth Amendment rights. *Arizona v. Evans*, 514 U.S. 1, 11 (1995) (citations omitted). The inescapable and disturbing conclusion is that persons accused of committing crimes in the Eighth and Tenth Circuits will have different constitutional rights as regards permissible constitutional limits of searches and seizures. This presents the kind of compelling reason that supports review by the Court on Certiorari. Therefore, Henderson's petition for certiorari should be granted.

D. The Eighth Circuit Misapplied the "Good Faith" Exception, to Petitioner's Prejudice.

Item 14 of the Federal Search Warrant gave the executing officers absolute discretion as to the contents of all computers in Henderson's house, without **any** indication as to what particular items on those computers should be seized. The language of a warrant must be sufficiently particular and definite to enable the searching officer to reasonably ascertain and identify the things to be seized, so as to avoid

"exploratory rummaging of a person's belongings." *See U.S. v. Saunders*, 957 F.2d 1488, 1491 (8th Cir. 1992), *rehearing denied.*

In finding no evidence of bad faith, Magistrate Mayeron's reliance on *U.S. v. Thomas*, 263 F.3d 805, 811 (8th Cir. 2001) was misplaced because that case involved a simple mistake as to the correct address of a residence to be searched. Though "good faith" may cure a facially invalid warrant under *Thomas*, it cannot here because the executing officer did not know how many computers existed in Henderson's house, the warrant did not specify which computer records were to be seized, nor did it even suggest that the items to be seized were related to any alleged illegal activity. (App., A-85 ¶ 14). *See In re Grand Jury Proceedings*, 716 F.2d 493, 499 (8th Cir. 1983) ("Where the warrant allows a seizure of everything, the items seized necessarily will correspond to the scope of the warrant. The crucial question is whether the warrant authorized too much under the law.").

In upholding the district court's denial of Henderson's motion to suppress computer-based evidence seized pursuant to an admittedly overbroad search warrant, the appeal court held that: "..., the officer had a reasonable belief that warrant was limited to the seizure of computer files and drives related to Henderson's business activities, finances and disability." *See U.S. v. Henderson*, 416 F.3d at 695. In so holding, the Eighth Circuit Court of Appeals failed to recognize that the very act of seizure of a computer hard drive is overbroad itself, as the majority of information and electronic documents seized had no relation to the alleged crimes charged. Indiscriminate seizure of a hard drive is akin to seizing library shelves with every book on the shelves, in the hope that some book may contain some papers that will be evidence of some crime.

Certiorari should be granted to review this matter because the search warrant issued as to computer records was

facially overbroad, a deficiency that cannot be cured by a "good faith" exception. The warrant and subsequent search of Henderson's computers thus violated her rights under the Fourth Amendment. Moreover, the differing application of the "good faith" *Leon* exception in the Eighth and Tenth Circuits warrants review by this court on certiorari.

II. THE NEED FOR GUIDANCE ON THE APPLICATION OF THE DOCTRINE OF PRIMARY JURISDICTION AS IT RELATES TO THE ADMINISTRATIVE REGULATIONS OF THE SOCIAL SECURITY ADMINISTRATION AND TO CRIMINAL PROCEEDINGS SUBSEQUENT TO AN APPLICATION FOR DISABILITY BENEFITS PRESENTS A COMPELLING REASON TO REVIEW AN EXCEPTIONALLY IMPORTANT FEDERAL MATTER ON CERTIORARI.

In 1999, Petitioner applied for, and was granted, Social Security Disability Insurance ("SSDI") benefits. (App., A-93). After reopening the administrative file, the Social Security Administration determined on December 11, 2003 that an overpayment had occurred, and stated that such an overpayment of benefits had to be determined within the Social Security Administration. Petitioner Henderson appealed that determination, which, as of the date of this petition, has not been adjudicated. Despite the fact the administrative process remained incomplete, on December 16, 2003, the government indicted Petitioner on charges related to allegedly false statements she made during the SSDI application process. Petitioner, not having had her administrative appeals yet resolved, has been subjected to criminal prosecution and is serving a prison sentence even while her eligibility for SSDI benefits is under review.

The doctrine of primary jurisdiction requires that, in cases where an administrative regulation is at issue (here, the enabling regulations for Social Security Act; 20 C.F.R. § 404.1520), courts should defer to the expertise of an administrative agency. The purpose of the primary jurisdiction doctrine is to "promot[e] the proper relationships between the courts and administrative agencies charged with regulatory duties." *U.S. v. Western Pac. R. Co.*, 352 U.S. 59, 63 (1956). Such deference is appropriate where, as here, the issue requires specialized agency expertise or raises concerns of uniform application of a regulatory scheme. *DeBruce Grain, Inc. v. Union Pacific R. Co.*, 149 F.3d 789 (8th Cir. 1998). Although arising more often in civil litigation, courts regularly apply the doctrine in criminal matters. *Liquilux Gas Corp. v. Martin Gas Sales, Inc.*, 779 F. Supp. 665 (D.Puerto Rico 1991); *U.S. v. Yellow Freight System, Inc.*, 762 F.2d 737, 741 (9th Cir. 1985); *U.S. v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977).

The district court should have deferred to the Social Security Administration ("SSA") upon Henderson's motion. Instead, the district court proceeded with the criminal proceeding, leading to a conviction for false statements and omissions on an application for SSDI benefits even prior to having Petitioner Henderson's administrative appeals regarding her eligibility for SSDI benefits resolved. This underscores the importance of this issue. The nature of the crimes for which Henderson was convicted – making materially false statements and omissions to obtain SSDI benefits – turns in part on the very question under consideration by the SSA: Henderson's eligibility. In other words, she was convicted for seeking and obtaining benefits to which she was not objectively entitled.

The question presented here is compelling and one of exceptional importance because, for the class of persons who have applied for SSDI benefits, there is no clear guidance as to whether a criminal court, under the doctrine of primary

jurisdiction, should defer proceedings to the SSA when the agency's own regulations are implicated. Simply put, persons who apply for SSDI benefits should be free to do so without fear of criminal prosecution. As the district court's failure to defer Petitioner Henderson's criminal prosecution to the SSA did not comport with the doctrine of primary jurisdiction, this matter warrants review on certiorari.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
for the Eighth Circuit

No. 04-4151

United States of America,

Appellee,

v.

Appeal from the United States District Court for the District of Minnesota.

Denise Marie Henderson

Appellant,

Submitted: June 23, 2005
Filed: August 1, 2005

Before RILEY, BOWMAN, and BENTON, Circuit Judges.

BENTON, Circuit Judge.

A jury convicted Denise Marie Henderson of five counts of wire fraud, one count of concealment from the Social Security Administration (SSA), and three counts of making false statements to SSA, in violation of 18 U.S.C. § 1343 and 42 U.S.C. § 408(a)(3), (4). She appeals, challenging the evidence, indictment, jury instruction, sentence, and jurisdiction of the district court[1]. Jurisdiction being proper under 28 U.S.C. § 1291, this court affirms.

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[1] The Honorable David S. Doty, United States District Court Judge for the District of Minnesota.

In 1995, Henderson was injured in a car accident. In 1996, six months before applying for social security disability income (SSDI), she flew to Russia to adopt a child. She told the social worker that she owned her own business, worked 15 to 20 hours a week, and was in good health and physically active. Weeks before applying for SSDI, she sought cosmetic surgery, informing the surgeon she had no significant past or current medical illnesses.

In 1997, Henderson applied for SSDI, telling SSA she could not work. She claimed she had: 4 to 5 migraines a week; vertigo; numbness; and could not walk, kneel, climb, bend, lift, reach, concentrate, do chores or errands, attend to personal grooming needs, drive for more than 20 minutes, or sit or stand for more than 20 minutes. The SSA denied her application initially and on appeal. While appealing, Henderson worked for her husband's company, Marketing That Works, Inc. She instructed the employees not to tell anyone she worked there. In 1999 – after Henderson testified at a hearing – an Administrative Law Judge reversed SSA, and awarded her benefits, retroactive to June 1996. Henderson promised to notify SSA if her medical condition improved or if she returned to work.

While applying for and receiving SSDI, Henderson had 21 cosmetic consultations, never alerting the doctors to any serious medical conditions. During the four years she received SSDI, Henderson competed in beauty pageants. In 1998, she made seven appearances as Mrs. Washington County and won the Mrs. Minnesota International pageant. In 1999 and 2000, she made over 200 appearances as Mrs. Minnesota. Between 1999 and 2003, Henderson also competed in Mrs. United States, Ms. U.S. Continental, Mrs. International, and All American – which required travel to Las Vegas, Nevada; Tyler, Texas; Orlando, Florida; and Pigeon Forge, Tennessee. Henderson also flew for vacations

to: Acapulco, Jamaica, New Zealand and Australia in 1996; Texas and New York in 1998; Hawaii in 1999; and Cancun in 2000.

A search warrant executed at Henderson's home revealed she was operating two businesses out of her home while receiving S SDI. Police found invoices, checks, contracts, press releases, credit card receipts, and emails in Henderson's name for her businesses, Crowning Moments, Inc. (CMI) and Queen Bear's Closet (QBC). The documents disclosed that she arranged contracts, attended meetings, kept finances, solicited clients, found sponsors and conducted marketing for both enterprises. As director of CMI, Henderson directed seven pageants between 2001 and 2003. QBC was a consignment shop that sold used pageant wear.

In total, Henderson submitted eight reports to SSA stating she had a disabling condition resulting in chronic migraines, neck and back pain, numbness, and other ailments. Prior to 2003, Henderson failed to report to SSA her activities or pageant competitions. When she did list her hobbies, she stated she worked eight hours a week for CMI, and attended pageants when she felt good.

I.

Primary jurisdiction permits a court to dismiss or stay an action in deference to a parallel administrative agency proceeding. ***Jackson v. Swift Eckrich, Inc.***, 53 F.3d 1452, 1456 (8th Cir. 1995). This promotes uniformity, consistency, and the optimal use of the agency's expertise and experience. *See* ***Access Telecommunications v. Southwestern Bell Telephone Co.***, 137 F.3d 605, 608 (8th Cir.), cert. denied, 525 U.S. 962 (1998). The doctrine, however, should be used sparingly, particularly where Congress has decided that the courts should consider an issue. ***United States v. McDonnell***

Douglas Corp., 751 F.2d 220, 224 (8th Cir. 1984). This court appears to review primary jurisdiction de novo. *See* Access, 137 F.3d at 608; ***DeBruce Grain, Inc. v. Union Pacific R.*** Co., 149 F.3d 787, 790 n.4 (8th Cir. 1998).

Henderson argues that her case should have been deferred to SSA because SSDI eligibility is a complicated, regulatory issue requiring agency expertise. Contrary to Henderson's assertion, the jury was not asked to measure Henderson's eligibility against SSA's regulations, but to decide whether she misrepresented or omitted material facts to SSA. The function of a jury is to weigh the evidence and assess the credibility of witness, particularly in cases of fraud. *See* ***United States v. Baumgardner***, 85 F.3d 1305, 1310-11 (8th Cir. 1996).

She also argues that the refusal to defer to SSA denied her procedural due process because she was not "heard at a meaningful time and in a meaningful manner." *See* ***Morrissey v. Brewer***, 408 U. S . 471, 481 (1972). She claims a further due process violation, asserting she likely would have received a favorable administrative ruling, resulting in (some) issue preclusion in her criminal prosecution.[2]

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[2] Henderson's SSDI case was reopened on an ALJ's own motion in 2003 (before her criminal trial). The ALJ found Henderson was not disabled, and that she had received an overpayment,. Henderson has appealed that determination, which is still pending. *Henderson v. Barnhart*, No. 2005-CV-00215 (filed 1/31/05, D. Minn.). In addition, the government has sued for damages and civil penalties for the same false statements as those in the criminal trial. *United States v. Henderson*, 2004 WL 540278 (D. Minn. Mar. 16, 2004). The civil case is stayed pending this appeal.

Although Henderson's administrative proceeding was not concluded before her criminal trial, she had ample opportunity to be heard at a meaningful time and place. *See* ***United States v. Lahey Clinic Hospital, Inc.***, 399 F.3d 1, 7-8, 12 (1st Cir. 2005); ***Ram v. Heckler***, 792 F.2d 444, 447 (4th Cir. 1986). At trial, she testified, presented evidence, and faced accusers and witnesses. Henderson's procedural rights were fully protected.

Further, Henderson cites no statute or precedent that entitles a defendant to an administrative resolution before a criminal prosecution (even if the defendant might obtain a favorable agency decision). Finally, a district court certainly has jurisdiction of a prosecution for social security fraud. *See generally* ***Baumgardner***, 85 F.3d at 1305. Despite SSA's comprehensive regulatory scheme, Congress explicitly made it a crime to conceal material facts from, or make false representations, to SSA. *See* 42 U.S.C. § 408(a)(3),(4).

The district court properly refused to invoke the primary jurisdiction doctrine.

II.

Henderson asserts that there was insufficient evidence to support the verdict. She complains that the government failed to prove that her businesses were "substantial gainful activity," or that she was not disabled and ineligible for SSDI benefits. 42 U.S.C. § 1382c(a)(3)(E); 20 C.F.R. §§ 404.1572, 404.1520. None of these are required elements of wire fraud, concealment or misrepresentation. She also contends that the government failed to demonstrate that she harbored any fraudulent intent or that her representations were material – which are required elements of 18 U.S.C. § 1343 and 42 U.S.C. § 408(a)(3).

Intent frequently cannot be proven except by circumstantial evidence; the determination often depends on the credibility of witnesses, as assessed by the factfinder. ***United States v. Erdman***, 953 F.2d 387, 390 (8th Cir. 1992). Here, the jury may infer Henderson's intent from her conduct. *See* ***United States v. Gravatt***, 280 F.3d 1189, 1192 (8th Cir. 2002). The government produced ample circumstantial evidence of her intent by showing inconsistencies between her statements to SSA and her conduct. She claimed she had four to five migraines a week, yet after 21 consultations, told her cosmetic surgeon she had only one or two a month. She told SSA she could not travel, but toured the country vacationing and competing in pageants. She stated she could not concentrate, yet managed two businesses. Intent is also evident in Henderson's instruction to employees not to tell anyone she was employed. The jury could reasonably infer that Henderson intentionally misled SSA.

She also complains the government did not prove that her statements or omissions were material to SSA's decision. In federal statutes criminalizing false statements to public officials, materiality means any "natural tendency to influence, or was capable of influencing, the decision of the decision making body to which it was addressed." ***Kungys v. United States***, 485 U.S. 759, 769-70 (1988); ***Baumgardner***, 85 F.3d at 1307 n. 1. Henderson's statements conveyed that she was unable to work or perform any physical tasks; she did not disclose her activities, pageant competitions and travels; an SSA expert testified that Henderson's misrepresentations and concealments influenced SSA's decisions. Thus, a jury could reasonably find that the statements and omissions were material to SSA's decision.

Reviewing the evidence in the light most favorable to the verdict, and giving the government the benefit of all reasonable inferences logically drawn from the evidence, no

reasonable jury could have found Henderson innocent. *See* ***United States v. Goodson***, 155 F.3d 963, 966 (8th Cir. 1998).

III.

Henderson contends that the superceding indictment was facially defective because it was not supported by facts, and did not allege a mens rea for any count, or materiality as an element of wire fraud. This challenge is reviewed de novo. ***United States v. Covey***, 232 F.3d 641, 645 (8th Cir. 2000). However, because she did not raise this issue prior to trial, the indictment is "liberally construed in favor of sufficiency." ***United States v. Davis***, 103 F.3d 660, 675 (8th Cir. 1996). An indictment is sufficient if it apprises the defendant of the elements of the offenses charged, and enables the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. ***Hamling v. United States***, 418 U.S. 87, 117 (1974).

The indictment here adequately apprises Henderson of the mens rea for each count. The indictment charges that for wire fraud, Henderson "devised and intended to devise a scheme and artifice to defraud." For concealment, the indictment alleges that she "with the intent to fraudulently secure payments...knowingly conceal[ed]," For misrepresentation to an agency, the indictment states that Henderson "knowingly and willfully . . . made false statement and representation of a material fact." The indictment does not state materiality as an element of wire fraud; however, the concept is intended in the common law definition of "scheme to defraud." *See* ***Neder v. United States***, 527 U.S. 1, 25 (1999). An indictment need not use specific words, so long as by fair implication it alleges the charged offense. ***United States v. O'Hagan***, 139 F.3d 641, 651 (8th Cir. 1998). The indictment here gave sufficient notice of the charged offenses.

As to facts, the indictment states Henderson's disabling condition as she reported it, and her actual conduct. The indictment is supported by sufficient facts. ***See United States v. Just***, 74 F.3d 902, 904 (8th Cir. 1996).

The indictment here adequately charges the offenses and the facts.

IV

Over Henderson's objection, the district court admitted evidence of her businesses, travel, pageant-competitions, and large suburban home. She asserts that because SSDI is not a means-based program, this evidence was prejudicial and irrelevant. Evidence is relevant if it tends to show that any fact is more or less probable. **Fed. R. Evid. 401**. It is generally admissible unless its probative value is "substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 402, 403. Evidence is "not unfairly prejudicial merely because it hurts a party's case." ***United States v. Emeron Taken Alive,*** 262 F.3d 711, 714 (8th Cir. 2001). The district court is given broad discretion when gauging the possibility of unfair prejudice, and is reversed only for abuse of discretion. ***United States v. Christians***, 200 F.3d 1124, 1127 (8th Cir. 1999).

Evidence of Henderson's businesses, travel, and pageants is relevant because it tends to show whether she misrepresented material facts to SSA. Henderson claimed she could not work or "keep up with reading daily mail," yet managed the businesses QBC and CMI. She averred that she could not sit or stand for more than 20 minutes and that she "doesn't go out much - riding in a car is too painful," but traveled to Acapulco, Jamaica, Hawaii, Cancun, Florida, Nevada, Texas, Tennessee, and throughout Minnesota.

Henderson claimed she could not "lift, carry, cook, clean or even grocery shop without severe pain," and that "every movement causes extreme pain." Evidence of attending over 200 appearances as Mrs. Minnesota – as well as training for and competing in at least five pageants – tends to demonstrate that Henderson misrepresented and omitted material facts relevant to her physical capacity.

Finally, the government offered into evidence a photograph of Henderson's large suburban home, in order to "walk through the search warrant" with the jury. While the photograph was only tangentially relevant and somewhat prejudicial – as indicated by the government's failure to defend its admissibility on appeal – any error was harmless beyond a reasonable doubt. *See* ***United States v. Sprouts***, 282 F.3d 1037, 1044 (8th Cir. 2002).

The district court did not abuse its discretion.

V

A jury instruction, taken as a whole and viewed in light of the evidence and applicable law, must fairly and adequately reflect the issues in the case. ***Preston v. United States***, 312 F.3d 959, 961 (8th Cir. 2002). A district court's instruction is reviewed for an abuse of discretion and is reversed only upon a finding that the instructional error affected the defendant's substantial rights. ***United States v. Gianakos***, 404 F.3d 1065, 1072 (8th Cir. 2005).

Henderson argues that the district court abused its discretion in its instruction on "materiality," which was based on the Eighth Circuit Model Criminal Jury Instruction, § 6.18.1001B (2003). She cites ***Hinchey v. Shalala***, 29 F .3 d 428, 432-33 (8th Cir. 1994), for the proposition that materiality means "reasonable likelihood to change the

outcome" of agency decision. Hinchey is inapposite; it addresses the standard for reviewing new evidence after the conclusion of an agency proceeding. ***Id.*** at 433.

The instruction on false statement here stated: "A statement is "material" if it has a natural tendency to influence, or be capable of influencing, the decision of the Social Security Administration. However, whether a statement is "material" does not depend on whether the Social Security Administration was actually deceived or whether the Social Security Administration's decision would have been different." When instructing on federal statutes criminalizing false statements to SSA, this is proper instruction on materiality. *See* ***Kungys***, 485 U.S. at 769-70; ***United States v. Mitchell***, 388 F.3d 1139, 1143 (8th Cir. 2004); ***United States v. Turner***, 189 F.3d 712, 722 (8th Cir. 1999); ***Baumgardner***, 85 F.3d at 1307 n. 1. The issue of materiality was fairly and adequately presented. There was no abuse of discretion.

VI.

The district court enhanced Henderson's sentence range *from* 37 to 46 months *to* 46 to 57 months after determining she had obstructed justice. Henderson argues this enhancement violated her Sixth Amendment rights because it was not based on facts found by a jury beyond a reasonable doubt or admitted by her. *See* ***United States v. Booker***, 125 S.Ct. 738, 756 (2005), *citing* ***Blakely v. Washington***, 542 U.S. ---, 124 S.Ct. 2531, 2537 (2004). She claims that ***United States v. Sdoulam***, 398 F.3d 981, 995 (8th Cir. 2005), mandates a remand for resentencing.

The *Sdoulam* case was decided before this court's en banc decision in ***United States v. Pirani***, 406 F.3d 543, 550 (8th Cir. 2005) (en bane). Because Henderson objected to the enhancement at sentencing, harmless error review applies.

See id., 406 F.3d at 549-50. Harmless error is an "error, defect, irregularity, or variance which does not affect substantial rights. . . ." Fed. R. Crim. P. 52(a). ***United States v. Olano***, 507 U.S. 725, 734 (1993). To establish that the sentencing error was harmless, the government must establish beyond a reasonable doubt that the error did not affect Henderson's ultimate sentence. ***United States v. Archuleta***, --- F.3d ----, 2005 WL 1513136 (8th Cir. Jun 28, 2005).

The government offers three justifications that the sentencing error was harmless. First, the ultimate sentence did not exceed the initial, non-enhanced, 37-to46-month range. Second, "when a sentencing judge must choose between two sentencing ranges that overlap, and expressly acknowledges that it would impose the same sentence under either range, this court can be certain that an error in choosing the wrong range was harmless." ***United States v. Schlifer***, 403 F.3d 849, 854 (7th Cir. 2005); *see also* ***Pirani***, 406 F.3d 551-52. Third – and most importantly – when the district court imposed its sentence of 46 months, it stated, "if the guidelines are held to be constitutional by the Court, then this will be a guideline sentence. If they're held to be unconstitutional by the Court, then I'm using the guidelines only as a guide. . . ." This court finds that any sentencing error was harmless beyond a reasonable doubt. See ***United States v. Bassett***, 406 F.3d 526, 527 (8th Cir. 2005).

Henderson argues that the "intended loss" calculation of $743,973 (based on expected benefits until retirement age) was erroneous because the indictment did not allege an intended loss and because her benefits were terminated after an actual loss of $193,509. This argument fails. First, intended loss is a sentencing enhancement, which the government does not need to allege in an indictment. *See generally* ***United States v. Sample***, 213 F.3d 1029, 1034 (8th Cir. 2000). Second, intended loss means intended pecuniary

harm even if the loss cannot occur. *See* **U.S.S.G § 2B1.1**; *see also* ***United States v. Staples***, 410 F.3d 484, 491-92 (8th Cir. 2005). Because the jury found that Henderson intended to continue receiving SSDI, when it actually ended is irrelevant to calculating the intended loss. See ***United States v. Rettenberger***, 344 F.3d 702, 708 (7th Cir. 2003) (loss calculation based on prospective SSDI payments until retirement age). Finally, because the jury specifically found the amount of intended loss, there is no Sixth Amendment violation. ***Booker***, 125 S.Ct. at 749.

VII.

Henderson contends that the district court erred by denying her motion to suppress evidence seized with an overly-broad search warrant. A search warrant must state with sufficient particularity the property to be seized. ***United States v. Horn***, 187 F.3d 781, 788 (8th Cir. 1999), cert. denied, 529 U.S. 1029 (2000). The degree of specificity, however, depends on the circumstances and the types of items. ***Id***. In a scheme to defraud, "a search warrant is sufficiently particular in its description of the items to be seized 'if it is as specific as the circumstances and nature of activity under investigation permit.'" ***United States v. Kail***, 804 F .2d 441, 445 (8th Cir. 1986), quoting ***United States v. Wuagneaux***, 683 F.2d 1343, 1349 (11th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983). This court will uphold the denial of a motion to suppress unless it rests on clearly erroneous findings of fact, or reflects an erroneous view of the applicable law. ***United States v. Hill***, 386 F.3d 855, 858 (8th Cir. 2004)

The warrant stated that police could search, "Records which appear on any and all computers which are located in the house, to include the hard drive and any disks which are located in the house." After finding the warrant overly broad,

the district court relied on the good-faith exception in ***United States v. Leon***, 468 U.S. 897, 92324 (1984). The court found that the police had probable cause for the search, there was no evidence of bad-faith or a biased magistrate, and the officer who requested the warrant was the same officer who executed it. Finally, in the context of the rest of the warrant, the officer had a reasonable belief that warrant was limited to the seizure of computer files and drives related to Henderson's business activities, finances and disability. ***See United States v. Saunders,*** 957 F.2d 1488, 1491 (8th Cir. 1992). The district court's findings are not clearly erroneous.

* * *

The district court's judgment is affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA

Plaintiff

v. Case Number: 03-437(DSD/JSM)

USM Number: 11401-041
Social Security Number: 0939
Date of Birth: 1960

Denise Marie Henderson

Defendant

Howard Bass
Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THE DEFENDANT was found guilty on counts 1 through 9 of the Superseding Indictment after a plea of not guilty on 08/09/2004

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 1343	Wire Fraud	April 3, 2002	1-4
18 USC 1343	Wire Fraud	April 3, 2003	5
42 USC 408(a)(4)	Concealment from Social Security Administration	December 10, 2004	6
42 USC 408(a)(3)	False Statement to the Social Security Administration	May 5, 2002	7-9

The defendant is sentenced as provided in pages 2 through 6of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant, shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:

December 10, 2004

s/ David S. Doty
Senior United States District Judge
December 10, 2004

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 46 months. This term consists of 46 months on each of Counts 1 through 9, all to be served concurrently.

The Court makes the following recommendations to the Bureau of Prisons:

1 That the defendant be incarcerated in FCI Pekin, Pekin, Illinois.

The defendant shall surrender for service of sentence on or after 30 days, at the institution designated by the Bureau of Prisons as notified by the Probation or Pretrial Services Office.

ACKNOWLEDGMENT OF RECEIPT

I hereby acknowledge receipt of a copy of this judgment this _____day of _____

_____
Signature of Defendant

RETURN

It is hereby acknowledged that the defendant was delivered on the _____ day of _____ to _____, with a certified copy of this judgment.

_____
UNITED STATES WARDEN
By: _____

NOTE: The following certificate must also be completed if the defendant has not signed the Acknowledgment of Receipt, above.

CERTIFICATE

It is hereby certified that a copy of this judgment was served upon the defendant this _____ day of _____

UNITED STATES WARDEN
By: _____

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years. This term consists of 3 years on each of Counts 1 through 9, all to be served concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the. Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.
The defendant shall not possess .a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district

without the permission of the court or probation officer;

2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law

enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall provide the probation officer access to any requested financial information, including credit reports credit card bills bank statements, and telephone bills.

2. The defendant shall be prohibited from incurring new credit charges or opening additional lines of credit without approval of the probation officer

3. Because the instant offense is not drug related and. the defendant does not have a history of drug abuse, the defendant is not required to undergo mandatory drug testing as set forth by 18 U.S.C. §§ 3563(a) and 3583(d).

CRIMINAL MONETARY PENALTIES

The defendant shall pay: the following total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

Total Assessment	Total Fine	Total Restitution
$900.00		$193,509.00

The Court has determined that the defendant does not have the ability to pay interest and it is ordered that:

FINE

No fine imposed.

RESTITUTION

Restitution in the amount of $193,509.00 is hereby ordered. The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of payment
SSA-Debt Management Section Attn: Court Refund P.O. Box 2861 Philadelphia, PA 19122	$193,509.00	$193,509.00	Priority Order/Percentage
Totals	$193,509.00	$193,509.00	

**Findings for the total amount of losses are required under Chapters 109A, 110,110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay; payment of the total criminal monetary penalties shall be due in full immediately as follows:

The defendant, shall pay the special assessment in the amount of $900.

Payment of $25,000 is due sixty days from the date of this judgment.

Special instructions regarding the payment of criminal monetary penalties:

Over the period of incarceration, defendant shall make payments of either quarterly installments of a minimum of $25 if working non-UNICOR or a minimum of 50 percent of monthly earnings if working UNICOR. It is recommended that defendant participate in the Inmate Financial Responsibility Program while incarcerated. Payments of not less than $500 per month are to be made over a period of 3 years commencing 30 days after defendant's release from confinement. Payments are to be made payable to the Clerk, U.S. District Court, for disbursement to the victim.

Interest is waived in accordance with 18 U.S.C. § 3612(f)(3).

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk ofthe court, unless otherwise directed by the court, the probation officer or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The defendant shall inform the probation officer of any change in his or her economic circumstances affecting the ability to make monthly installments, or increase the monthly payment amount, as ordered by the court. In the event a defendant is able to make a full or substantial payment toward the remaining criminal monetary penalty, he or she shall do so immediately.

The defendant is restrained from transferring any real or personal property, unless it is necessary to liquidate and apply the proceeds of such property as full or partial payment of the criminal monetary penalty.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,

CRIMINAL NO: 03-437 (DSD/JSM)

Plaintiff,

v. REPORT AND RECOMMENDATION

DENISE MARIE HENDERSON,

Defendant.

JANIE S. MAYERON, United States Magistrate Judge

The above matter came on before the undersigned upon defendant Denise Marie Henderson's Motions (1) Unless Otherwise Dismissed as a Matter of Law, to Refer this Matter to an Appropriate Federal Agency under the Doctrine of Primary Jurisdiction [Docket No. 19]; (2) Motion to Suppress Evidence Obtained as a Result of Search and Seizure [Docket No. 20]; (3) Motion for Return of Items Seized [Docket No. 28]; and (4) Supplemental Motion to Suppress Evidence and Derivative Evidence Obtained as a Result of the Ramsey County Warrant [Docket No. 30].[1]

[1] The following motions are addressed by separate Orders of the Court: Defendant Denise Marie Henderson's motions to Compel Attorney for the Government to Disclose Evidence Favorable to the Defendant [Docket No. 13], (2) for Disclosure of 404 Evidence [Docket No. 14], (3) for Government Agents to Retain Rough Notes [Docket No. 15], (4) for Early Disclosure of Jencks Act Material [Docket No. 16], (5) for Discovery of Expert Under Rule 16(a)(1)(E) [Docket No. 17], (6) for Discovery and Inspection [Docket No. 18], (7) Motion to Continue Case [Docket No. 21], and

Assistant United States Attorney Joseph Dixon appeared on behalf of the Government. Earl P. -Gray, Esq. appeared on behalf of defendant Denise Marie Henderson; who was personally present. The matter was referred to the undersigned by. the District Court for a Report and Recommendation pursuant to 28 U.S.C. § 636 (b)(1)(B).

Based upon the pleadings, the pre-hearing submissions, and the post-hearing submissions,[2] it is recommended that:

1. Defendant's Motion, Unless Otherwise. Dismissed as a Matter of Law, to Refer this Matter to an Appropriate Federal Agency under the Doctrine of Primary Jurisdiction [Docket No. 19] be **DENIED**,

2. Defendant's Motion to Suppress Evidence Obtained as a Result of Search and Seizure [Docket No. 201 be **DENIED**:

3. Defendant's Motion for Return of Items Seized [Docket No. 28] be **DENIED**; and

4. Defendants Supplemental Motion to Suppress Evidence and Derivative Evidence Obtained as a

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(8) Motion to Dismiss Case Based on Double Jeopardy [Docket No. 22]; and the Government's Motion for Discovery Pursuant to FRCP 16(b), 12.1, 12.2 and 26.2 [Docket No. 2], and Motion for Handwriting Exemplars [Docket No. 29].

[2] The only evidence presented to the Court in connection with defendant's motions were the three search warrants and accompanying applications and affidavits. See Gov't. Exs A, B, and C. No witness testimony was presented to the Court at the hearing.

Result of the Ramsey. County Warrant [Docket No. 301 be **DENIED**.

FACTS

The Superseding Indictment in this case alleges that Henderson submitted fraudulent information to the Social Security Administration ("SSA") regarding her true physical condition, capabilities, and her ability to engage in work activity, for the purpose of defrauding the SSA to obtain Social Security Disability benefits. Specifically, the Superseding Indictment alleges that Henderson filed an application for disability benefits arising out of a disabling condition that was a result of a car accident of December 19, 1995. See Superseding Indictment, ¶ 4. In her application, Henderson claimed that she had not worked since December 19, 1995. Id. Henderson also submitted a disability report to the SSA, dated October 14, 1997, identifying her disabling injuries as temporomandibular[3] related head aches, numbness in right arm and hand, migraines, neck and back pain, lower back pain, numbness/tingling in foot, and vertigo. Id. at ¶ 6. Henderson stated that these ailments prevented her from engaging in any activity using her right hand, talking on the phone, and any activity requiring sitting, bending over, or standing. Id. Henderson submitted a pain report to the SSA on October 14, 1997, claiming that she could hardly use her right hand, and that she could not sit, stand or lie down without severe pain. Id. at ¶ 6. Henderson also claimed that she was unable to do chores around the house, buy groceries, shop for clothes, bank, and could not drive for over twenty minutes at a time. Id. at ¶ 8. Further, Henderson claimed that her injuries impacted her ability to sit, stand, walk, knelt, squat, climb,

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[3] Temporomandibular: "Relating to the temporal bone and the mandible; denoting the joint of the lower jaw." STEADMAN'S MEDICAL DICTIONARY (2000).

bend, lift, reach, use her hand and concentrate. Id.

In January 19, 1998, Henderson represented to the SSA that she could not perform sedentary work[4] because she could not sit or stand for 20 minutes and because she suffered from vertigo if she titled her head. On February 20, 1998, Henderson represented to the SSA that that her migraine headaches were getting worse and that she could not sit for more than twenty minutes could not lift more than 5 to 7 pounds, and could not concentrate on anything due to her migraines Id. at ¶ 13. On April 27, 1998, Henderson represented to the SSA that she could not sit, stand, or walk for over twenty minutes. Id. at ¶ 15.

On January 4, 1999, Henderson told the Administrative Law Judge that she suffered from migraines five times per week, that she was unable to use her right arm without significant pain, and that she suffered from vertigo. Id. at ¶ 23. On March 27, 2000, Henderson submitted a Report of Continuing Disability. Interview to the SSA and reported that her condition had worsened since January 1999, that she could not' return to work, and that since she became disabled, she had not done any work. Id. At ¶ 34, 35. She also claimed that she suffered from a lack of concentration, dizziness, vertigo, chronic migraines, numbness In her fingers and hands, neck aches, back aches, and chronic pain, and that

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[4] 20 CFR § 416.967(a) provides that sedentary work:

> [I]nvolves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally arid other sedentary criteria are met.

her only other activity was to drive her son to school. Id. On May 5, 2002, Henderson filed a Report of Continuing Disability Interview with the SSA where she represented that her condition had worsened, and that she was unable to work due to chronic migraines, neck and back pain and numbness in her right hand. Id. at ¶ 46. In addition, Henderson represented that she had not worked, that she rarely socialized outside the home, and attended neighborhoods activities on average of once a month. Id. at ¶ 47.

The Superseding Indictment alleges that despite her claims of disability, Henderson was engaged in a variety of different activities. For example, the Government alleges Henderson competed in at least five beauty pageants and made at least eight appearances as Mrs. Washington County during the period she claimed to be disabled. Id. at ¶ 12, 21, 22, 26, 28, 29 37, 38, 41. Further, the Superseding Indictment claims that Henderson and her husband directed beauty pageants during the relevant time period. Id. at ¶ 42; 44, 49, 50, 52, 53. The Superseding Indictment also alleged that Henderson continued to perform certain responsibilities as a marketing consultant, that she performed work activity for Doctors' Diet Clinic and Doctors' Wellness Center, was able to take numerous trips, and was well enough to engage in physical activities such as diving in Hawaii and dancing. Id. at ¶ 5,16-19, 25, 27, 29, 31, 37,45, 51, 55.

Based on these facts, Counts 1 through 5 of the Superseding Indictment alleged that Henderson engaged in wire fraud by knowingly causing to be transmitted, in interstate commerce, wire transfers of money from the SSA to a bank account designated by defendant. Id. at ¶ 62 Count 6 alleged that Henderson, with the intent to fraudulently secure payments, did knowingly conceal from and did fail to disclose to the SSA her true physical condition and capabilities, her activities, and her ability to engage in work activity, knowing

that these facts affected her right to receive disability benefits. Id. at ¶ 64. Count 7 alleged that Henderson made false statements to the SSA with regards to her physical condition and physical capabilities, in violation of 42 U.S.C. § 408(a)(3). Id. at 66.

In sum, the Superseding Indictment alleges that Henderson misrepresented and concealed her physical condition, her ability to function, and the true level of her ongoing activities during the period of 1996 to at least 2003.

Henderson has brought four different motions for consideration by this Court. The first motion seeks to refer this criminal matter to the SSA under the doctrine of primary jurisdiction. The second motion seeks to suppress evidence based on the three warrants executed in this case on grounds that they lacked particularity and were not supported by probable cause: the May 17, 2000 search warrant issued by a Washington County Judge for the residence and automobiles located at 12425 53rd Street North, Bayport Township ("Washington County Warrant"); the May 17, 2000 search warrant issued by a Ramsey County Judge for the offices, and automobiles located at 2353 Rice Street, Suite 203, Roseville; Minnesota ("Ramsey County Warrant"); and the February 24, 2003 search warrant issued by Federal Magistrate Judge Franklin L. Noel for the residence located at 3360 Crestmoor Drive, Woodbury, Minnesota 55125 ("Federal Warrant"). In addition, Henderson has brought a motion to suppress evidence gathered under the Ramsey County Warrant on grounds that the warrant was issued, a violation of state statute and the reasonableness requirement under the Fourth Amendment, to a Washington County law enforcement officer. Lastly, Henderson has requested, through her Motion for Return of Items Seized, that items seized by virtue of the warrants executed in this matter be returned to her and her family.

DISCUSSION

I. Motion to Refer Matter to an Appropriate Federal Agency Under the Doctrine of Primary Jurisdiction[5]

Henderson has represented to this Court that there is currently pending before the SSA an administrative review to determine whether she properly obtained benefits and is currently disabled. See Defendant's Memorandum of Law in Support of Pretrial Motions ("Def.'s Mem.") at 30; Defendant Dee Henderson's Motion, Unless Otherwise Dismissed as a Matter of Law, to Refer Matter to an Appropriate Federal Agency Under the Doctrine of Primary Jurisdiction, Ex. A. Consequently, Henderson argued that the SSA is the administrative agency charged with the award of SSA benefits, the determination of eligibility of such benefits, and termination of benefits based on allegations of fraud, and therefore, that primary jurisdiction for this case rests with the SSA as there is currently a case pending before it. On this basis, Henderson has requested that this Court dismiss or stay this case pending final determination of the SSA proceeding.

In opposition, the Government argued that the doctrine of primary jurisdiction has been applied in a limited number of circumstances where the interpretation of, particular regulation by the administrative agency is essential to the resolution of the same issue in a criminal case, such that the agency should be allowed to first resolve the

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[5] Henderson captioned her motion as a Motion To Refer This Matter To An Appropriate Federal. Agency Under the Doctrine of Primary Jurisdiction. However, in her supporting memoranda, she requested that the criminal matter be dismissed or stayed pending the outcome of the administrative proceeding before the SSA.

regulatory issue. See Government's Post-Hearing Memorandum in Response to Pretrial Motions eGov't. Post-Hearing Mem."), p. 4. Accordingly, the Government asserted there is no regulation which requires interpretation by the SSA before the criminal case can proceed forward; to the contrary, Congress enacted a criminal statute, 42 U.S.C. § 408, to expressly address the problem of Social Security fraud. Id.[6]

The doctrine of primary jurisdiction is a common law doctrine that allows a court to refer matters to an administrative agency in order to give it an opportunity to address issues within its expertise. See Access Telecommunications v. Southwestern Bell Tel. Co., 137 F.3d 605, 608 (8th Cir.), cert. denied, 525 U.S. 962 (1998).[7] There are four factors that must be present in cases where the doctrine has been properly invoked: "(1) the need to resolve

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[6] In its pre-hearing response, the Government did not address Henderson's primary jurisdiction argument. Rather, the Government characterized her motion as invoking the Double Jeopardy Clause, and then declared the argument to be "frivolous." See Government's Response to Defendant's Pretrial Motions ("Gov't. Pre-Hearing Mem."), p. 3.

[7] The language of the Access Telecommunications case suggests that the referral is discretionary. However, the Ninth Circuit has concluded that if the doctrine of primary jurisdiction applies, the referral is not discretionary. See United States v. General Dynamics Corp., 828 F.2d 1356, 1366, 1364, n. 15 (9th Cir. 1987) ("As we read the cases, however, an issue either is within an agency's primary jurisdiction or it is not, and, if it is, a court may not act until the agency has made the initial determination. Failure to defer when the doctrine so mandates is reversible error, (citation omitted) as is deferral in inappropriate situations." (citation omitted)).

an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration." United States v. General Dynamics Corp., 828 F.2d 1356, 1363 (9th Cir. 1987) (citations omitted)

> While it is certainly true that the competence of an agency to pass on an issue is a necessary condition to the application of the doctrine, competence alone is not sufficient. The particular agency deferred to must be one that Congress has vested with the authority to regulate an industry or activity such that it would be inconsistent with the statutory scheme to deny the agency's power to resolve the issues in question.

Id. Thus, a court must not employ the primary jurisdiction doctrine unless the particular division of power was intended by Congress. Id.

The primary jurisdiction doctrine has been applied in criminal cases. See United States v. General Dynamics Corp., 828 F.2d 1356, 1366 (9th Cir. 1987) (citing United States v. Pacific & A. Ry. & Navigation Co., 228 U.S. 87, 106-08, 33 S.Ct. 443, 448-49, 57 LE& 742 (1913); United States v. Yellow Freight Sys., 762 F. 2d 737, 742 (9th Cir. 1985). However, "[t]he Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws." See United States v. Armstrong, 517 U.S. 456, 464 (1996) (citation omitted); see also General Dynamics Corp., 828 F.2d at 1366 (quoting In re Subpoena of Persico, 522 F.2d 41, 54 (2nd Cir. 1975), quoting United States v. Cox, 342 F.2d 167 (5th Cir. 1965) (Wisdom, J., concurring) ("In general, the 'conduct [of] federal criminal

litigation ... is 'an executive function within the exclusive prerogative of the Attorney General,...'")). "Congress may limit or reassign the prosecutorial responsibility . . .[b]ut 'Rio graft such an exception upon the criminal law would require a clear and unambiguous expression of the legislative will.'" General Dynamics Corp., 828 F.2d at 1366 (quoting United States v. Morgan, 222 U.S. 274, 282 (1911)) (citations omitted). As the Ninth Circuit observed in General Dynamics Corp.:

> Requiring the government to litigate issues central to a criminal prosecution in collateral agency proceedings is at odds with the general rule of prosecutorial discretion over the bringing of criminal indictments. See, e.g., United States v. Carrasco, 786 F.2d 1452, 1455 (9th Cir.1986) ("[C]harging decisions are generally within the prosecutor's exclusive domain.... [The separation of powers mandates judicial respect for the prosecutor's independence....") (citations omitted); United States v. Lee, 786 F.2d 951, 956-57 (9th Cir. 1986) (same); United States v. Cox, 342 F.2d 167, 171 (5th Cir.) (describing the discretionary powers of the attorney general and finding that "as an incident of the constitutional separation of powers, ... the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the. United States in their control over criminal prosecutions"), cert. denied 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965).

General Dynamics Corp., 828 F.2d at 1366.

This Court rejects Henderson's motion to dismiss or stay her prosecution for based on the doctrine of primary

jurisdiction. First, Henderson has been charged with wire fraud, concealment of information regarding her true physical condition and capabilities from the SSA, and making false statements to the SSA. While the SSA plays an extensive role in regulating social security disability benefits, it has no ability to prosecute matters dealing with criminal fraud, let alone adjudicate a criminal matter. Further, neither the wire fraud statute, 18 U.S.C. § 1343, governing Counts 1 through 5 of the Superseding Indictment, nor 42 U.S.C. § 408, governing the counts of concealment from and false statements to the SSA, make reference to reassigning prosecutorial responsibility of violations of these statutes to the SSA or any other governmental agency. Moreover, there is nothing in the language of 18 U.S.C. § 1343 or 42 U.S.C. § 408, which suggests, "much less clearly and [un]ambiguously states, that action by the Department of Justice to prosecute [this case] is conditioned upon prior consideration of the alleged violation by the [agency]. Indeed it would strain the language to imply such a condition." General Dynamics Corp., 828 F.2d at 1366.[8] See United States v. Culliton, 328

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[8] Interestingly, the only regulation that this Court could locate with regards to the SSA's evaluation of fraud is 20 C.F.R. § 404.507, which addresses overpayment:

> Although the Administration may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment if such individual is not without fault, the Social Security Administration will consider all pertinent circumstances, including the individual's age and intelligence, and any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) the

F.3d 1074, 1082 (9th Cir. 2003) (finding that there was nothing in the pertinent statutory or regulatory framework of the FAA that prevented the Department of Justice from prosecuting an individual for the felony of making false statements to a government agency, and that while the FAA was "competent to determine if an applicant made false statements on a certificate form, it is squarely within the province of the Department of Justice to prosecute felonies of perjury and false statements.") To the contrary, in addition to creating the framework for administering the deliverance and recovery of social security payments, Congress explicitly made it a crime to conceal or make false representations to the SSA for the purpose of receiving benefits. See 42 U.S.C. § 408(a)(3) and (4).

> individual has. What constitutes fault (except for "deduction overpayments"-see § 404.510) on the part of the overpaid individual or on the part of any other individual from whom the Administration seeks to recover the overpayment depends upon whether the facts show that the incorrect payment to the individual or to a provider of services or other person, or an incorrect payment made under section 1814(ed) of the Act, resulted from: (a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or (b) Failure to furnish information which he knew or should have known to be material; or (c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect.

See also 20 C.F.R. § 404.515 (providing that an overpayment will not be compromised if there is an indication of fraud, the filing of a false claim, or misrepresentation).

Second, this Court rejects Henderson's argument that this case should be dismissed or stayed pending completion of the case pending before the SSA because of the SSA's specialized expertise in determining whether disability payments should be made or under what circumstances they should be repaid. There is nothing in the record to support the suggestion that the SSA is currently addressing Henderson's alleged concealment of information or fraud on the SSA. To the contrary, Henderson's February 11, 2004, Request for Review of the Administrative Law Judge's decision, attached as Exhibit A to the Henderson's Motion to Refer, does not address the issue of. recoupment of overpayments or any determination by the AU of fault or fraud on the SSA by Henderson. As such, there is no evidence before the Court that supports the contention that the AU even dealt with the issue of concealment of information or misrepresentations by Henderson so as to warrant this Court to delay the criminal proceedings in this matter.

Moreover, while it is true that the SSA is charged with determining whether an individual is entitled to social security disability insurance benefits and under what circumstances an individual might have to repay an overpayment, Henderson points to no SSA regulation in need of specialized Interpretation by the SSA before the criminal case can proceed forward, or specialized expertise' needed for determining whether Henderson engaged in wire fraud, concealment of information or fraud.

In sum, this Court concludes that it is "within the province of the Department of Justice to prosecute felonies of ... false statements." See Culliton, 328 F.3d at 1082. (citations omitted). As such, Henderson motion to dismiss or stay this case pending resolution of the administrative proceeding pending before the SSA should be denied.

II. Motion to Suppress Warrants

Henderson argues that the evidence :seized from the three search warrants issued in this case should be suppressed for three reasons First, all three warrants fail to comply with the Fourth Amendment's requirement that they set forth with sufficient particularity the items to be seized; second, all three warrants fail because their accompanying affidavits, do not provide sufficient probable cause; and third,. the Ramsey County warrant fails because the affiant and person who executed the warrant was a Washington. County law enforcement officer and not an officer from Ramsey County, the county of the issuing judge.

A. Particularity of Search Warrants

Henderson argues that the Washington County, Ramsey County and the Federal Warrants executed in this case do not comply with the Fourth Amendment to the United States Constitution as they were not sufficiently particular as to the items to be seized.

1. Standard of Review

The Fourth Amendment states, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. Amend. IV (emphasis added). "The fourth amendment requires that a search warrant describe with sufficient particularity the things to be seized in order to prevent a 'general, exploratory rummaging' in a person's belongings." United States v. Kail, 804 F.2d 441, 445 (8th Cir. 1986) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct 2022, 2038-39, 29 L.Ed.2d 564 (1971)). The level of specificity required is dependant on the specific

circumstances of a case and on the types of items to be seized. See United States v. Tyler, 238 F.3d 1036, 1039 (8th Cir. 2001) (quoting United States v. Horn, 187 F.3d 781, 788 (8th Cir. 1999), cert. denied, 529 U.S. 1029, 120 S.Ct. 1442, 146 L.Ed.2d 330 (2000)).[9] The Court will now proceed to address

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[9] Henderson also maintained that the materials being seized by the search warrants at issue implicate her First Amendment right to associate and communicate with others through electronic mediums, creating a heightened standard of particularity. See Def.'s Mem. at pp. 20-24. In support of this proposition, Henderson cited to Stanford v. Texas, 379 U.S. 476 (1965), Zurcher v. Stanford Daily, 436 U.S. 547 (1978), Voss v. Bergsgaard, 774 F.2d 402 (10th Cir. 1985), and United States v. Apkar, 705 F.2d 293 (8th Cir. 1983). In Stanford, the Supreme Court found that "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. Id. at 511-12. in Zurcher the Supreme Court applied the scrupulous exactitude standard to allegedly obscene photographs and to the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper. 436 U.S. at 565. In Voss, the Tenth Circuit found that the scrupulous exactitude standard should be applied to a search warrant, which authorized the seizure of all business records of the National Commodities and. Barter Association where the "organization's advocation of modifying or abolishing our country's tax system is a legitimate activity ... protected by the first amendment" 774 F.2d at 405-06. In Apkar, the Government was looking for evidence that constituted indicia of membership in an organization allegedly used for unlawful activities. Id. at 300. Although the items were not seized for their ideas, the court found that the scrupulous exactitude standard should apply as the items were seized for the

each search warrant to determine if it was sufficiently particular to meet the requirements of the Fourth Amendment.

2. Washington County Warrant – May 17, 2000, Search Warrant for 12425 53rd Street North Bayport Township

The Washington County Warrant authorized the search of the residence and vehicles located at 12425 53rd Street North, Baytown Township for the following property and things:

> **Any and all documents or records, stored in any manner, including, but not limited to those generated or stored via computer, including incoming and outgoing electronic mail, whether present or deleted, regarding the following:**

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associations they demonstrated, which was protected under the First Amendment. Id. at 301. However, since Apkar the Supreme Court "has explicitly stated that the reason for applying the more demanding standard in the First Amendment context is the special threat posed by prior restraints to First Amendment guarantees." Wabun-Inini v. Sessions 900 F.2d 1234, 1240 (8th Cir. 1990). See Alexander v. United States, 509 U.S. 544, 550 (1993) (quoting M. Nimmer, Nimmer on. Freedom of Speech § 4.03, p. 4-14 (1984) defining prior restraints as "'administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" Here, the items listed in the search warrants were sought as evidence of Henderson's alleged fraud in representing that she was not able to engage in work or physical activities, when in fact, she was. Thus, no prior restraints were Implicated, and the First Amendment scrupulous exactitude standard has no application to this case.

Income replacement, disability or other types of insurance held by DENISE MARIE (DITTRICH) HENDERSON, DOB 1/30/60) [sic], including, but not limited to payments therefrom; photographs; medical; chiropractic, therapeutic or other services; or other income replacement, disability or other insurance held by KENNETH AUSTIN HENDERSON, DOB 2/3/50, or by Andrew Jacob Dittrich, DOB 8/23190, or Amanda. Henderson, which would provide benefits as a result of DENISE MARIE (DITTRICH} HENDERSON'S alleged disability.

An auto accident alleged to have occurred on or about December 19, 1995, in which DENISE MARIE (DITTRICH) HENDERSON claimed to have been injured, including, but not limited to evidence of insurance; insurance forms, claims or payments; lawsuits and any settlement(s) therefrom; photographs; medical, chiropractic, therapeutic or other services.

Application or claims forms to, or benefits paid by any government, non-profit or other agency for benefits to DENISE MARIE (DITTRICH) HENDERSON, Kenneth. Austin Henderson, Andrew Jacob Dittrich, or Amanda Henderson, as a result of DENISE'S claimed disability, including, but not limited to, all supporting documentation.

Individual and family income for DENISE MARIE (DITTRICH) HENDERSON and/or Kenneth Austin Henderson, and business or corporate income from "Marketing that Works," "Doctors Wellness Clinic," "Doctors Diet Clinic," "Larry Tucker Inc.," or any other business or corporation in which DENISE

MARIE (DITTRICH) HENDERSON and/or Kenneth. Austin. Henderson are principals or employees or are in any way affiliated, from January 1, 1994, to the present, including, but not limited to salaries, wages and benefits; child support or maintenance payments, disability or other insurance payments; promotional fees; or any other source of income; including but not limited to tax records, payroll records, billing records, advertisings, contractual or other agreements and the like, and corporate or other papers which would tend to show who owns or is involved with the business entity/ies.

DENISE MARIE (DITTRICH) HENDERSON's participation in pageants or other contests or events, including but not limited to the "Mrs. Minnesota" pageant and any other national pageants, including, but not limited to photographs, videotapes or the like, showing her engaging in activities which she has claimed her disability prevented her from doing.

Anything which would tend to show that DENISE MARIE (DITTRICH) HENDERSON was able to perform activities she has claimed she cannot do, such as sitting, standing, moving her neck, raising her arms above the waist level, writing or typing, lifting, extending both arms, driving, bending, stooping [sic] reaching, lifting, exercising, performing duties as a marketing consultant, opening her mouth more than one or two fingers wide or performing household duties, including childcare.

Anything that would tend to corroborate DENISE MARIE (DITIRICH) HENDERSON'S claims of disability, including, but not limited to medical, pharmaceutical, therapeutic or physical fitness records

or devises.

See Gov't. Ex. A (emphasis in original).

Henderson's objections to the Washington County Warrant relate to the last two items in the warrant, i.e. the warrant's grant of permission to search for documents and records that would tend to show that Henderson was able to perform activities she claimed she could not do, and anything that would' corroborate Henderson's claims of disability. See Def.'s Mem. at p. 12. According to Henderson, because the language of these two paragraphs failed to describe with sufficient particularity the things to be seized, the executing officer had "carte blanche to seize whatever he or she may have believed to be evidence that Ms. Henderson was or was not disabled." Id.

This Court disagrees. The Eighth Circuit has found that when a warrant is used in a case involving a "scheme to defraud," it is sufficiently particular in terms of the items to be seized "'if it is as specific as the circumstances and nature of the activity under the investigation permit.'" United States v. Saunders. 957 F.2d 1488, 1491 (8th Cir.1992), cert. denied, 506 U.S. 889, 113 S.Ct. 256, 121 L.Ed.2d 187 (1992) (citing Kail, 804 F.2d at 445 (citation omitted)). In Saunders, the Eighth Circuit dealt with the particularity of a search warrant in the context of social security fraud under 42 U.S.C. § 408. Part of the search warrant at issue allowed the seizure of the following items, "[o]ther material evidence of violations of 42 U.S.C. § 408, social security fraud. 18 U.S.C. § 1001, false statements." Id. at 1490. The defendant claimed that this language was too broad and described the items to be seized with insufficient particularity. Id. at 1491. The Eighth Circuit disagreed, finding that the search warrant met the requirements of particularity and was therefore valid under the Fourth Amendment. Id. at 1491.

Similarly, in United States v. Stelten, 867 F2d 446 (8th Cir. 1989), cert. denied 493 U.S. 828 (1989), the Eighth Circuit found that a search warrant was "not facially overbroad because it called for the seizure of property being used in violation of federal law and because the seizure was limited to property involved in the alleged crime." Id. at 450.

Here, the first portion of the Washington County warrant challenged by Henderson contained an exhaustive list of activities Henderson claimed she could not do, such as "sitting, standing, moving her neck, raising her arms above the waist level, Writing or typing, lifting, extending both arms, driving, bending, stooping [sic] reaching, lifting, exercising, performing duties as a marketing consultant, opening her mouth more than one or two fingers wide or performing household duties, including childcare." The second allegedly offending portion of the search warrant requested documents and records that would tend to corroborate Henderson's claims of disability, "including, but not limited to medical, pharmaceutical, therapeutic or physical fitness records or devises." Given the broad nature of Henderson's representations as to her medical condition and inability to function, and the Government's knowledge of her ability to perform numerous activities, as set out in the affidavit that accompanied the application for the warrant, this Court finds that the two paragraphs at issue in the Washington County Warrant were as specific as the circumstances permitted. By providing numerous examples, both lists provided the searching officers with guidance and limits on what they were to search for and seize at the Washington County residence. Neither paragraph gave law 'enforcement officers unfettered: discretion to search and seize anything they wanted. On this basis, this Court finds that the Washington County Warrant should not be

suppressed for lack of particularity. [10]

3. Ramsey. County Warrant May 17, 2000 Search Warrant for Offices and Automobiles Located at 2353 Rice Street, Suite 203, Roseville, Minnesota

Henderson argues that portions of the search warrant for 2353 Rice Street, Suite 203, Roseville, Minnesota, are impermissibly overbroad. The Ramsey County Warrant, gave law enforcement officers the permission to search for:

> **Any and all documents or records, stored in any manner, including, but not limited to those generated or stored via computer, including incoming and outgoing electronic mail, whether present or deleted, regarding the following:**
>
> Income replacement, disability or other types of insurance held by DENISE MARIE (DITTRICH) HENDERSON, DOB 1/30/60), including but not

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[10] The facts in this case, are distinguishable from those found in Groh v. Ramirez, __U.S__ , 124 S.Ct. 1284 (2004), cited by Henderson, where the search warrant provided no description of the items to be seized. Id. at 1290. In particular, all that the search warrant in Groh stated was:

> '[T]here is now concealed [on the specified premises] a certain person or property, namely [a] single dwelling residence two story in height which is blue in, color and has two additions attached to the east. The front entrance to the residence faces in a southerly direction.'

Groh, 124 S.Ct. at 1288 n. 2.

limited to payments therefrom, photographs medical; chiropractic, therapeutic or other sources; or income replacement, disability or other insurance held by KENNETH AUSTIN HENDERSON, DOB 213/50, or by Andrew Jacob Dittrich, DOB 8/23/90 or Amanda Henderson, which would provide benefits as a result of DENISE MARIE (DITTRICH) HENDERSON'S alleged disability.

An auto accident alleged to have occurred on or about December 19, 1995, In which. DENISE. MARIE (DITTRICH) HENDERSON claimed to have been Injured, Including, but not limited to evidence of insurance; insurance forms, claims or payments; lawsuits and any settlement(s) therefrom; photographs; medical, chiropractic, therapeutic or other services.

Application or claims forms to, or benefits paid by, any government or non-profit agency for benefits to DENISE MARIE (DR RICH) HENDERSON, Kenneth Austin Henderson, Andrew Jacob Dittrich or Amanda Henderson, as a result of DENISE'S claimed disability, including but not limited to, all supporting documentation.

Individual and family income for DENISE MARIE (DITTRICH) HENDERSON and/or Kenneth Austin Henderson, and business or corporate income from "Marketing that Works," "Doctors Wellness Clinic," "Doctors Diet Clinic," "Larry Tucker. Inc.," or any other business or corporation in which DENISE MARIE (DITTRICH) HENDERSON and/or Kenneth. Austin Henderson are principals or employees or are in any way affiliated, from January 1, 1994, to the present, including, but not limited to salaries, wages

and benefits, child support or maintenance payments, disability or other insurance payments; promotional fees, or any other source of income; including, but not limited to tax records, payroll records, contractual or other agreements and the like.

DENISE MARIE (DITTRICH) HENDERSON'S participation in pageants, including, but not limited to the "Mrs. Minnesota" pageant and any national pageants, including but not limited to, photographs, videotapes or the like, showing her engaging in activities which she has claimed her disability prevented her from doing.

See Gov't. Ex. B.

Henderson concedes that Ramsey County Warrant does not contain language that authorizes a general, limitless search. See Def's Memo, at p. 19. Nevertheless, Henderson claims that "the language was still too broad to justify searching the computer for, in the language of the Ramsey County warrant, 'any and all records, stored in any manner' relating to income replacement, the auto accident, applications for and receipt of disability benefits, individual or family income, and Ms. Henderson's participation in pageants.'" Id. According to Henderson, the reason why this portion of the Ramsey County Warrant is overbroad is that it does not limit what could be searched for on the computer. Id.

Henderson misreads the Ramsey County Warrant. The search warrant did not authorize a general, unlimited search of all computer files. To the contrary, the search warrant expressly limited the specific types of items to be sought in the search of the computer Oust as it referenced these same documents in connection with the phrase "stored in any manner') including, evidence of income, evidence of the auto

accident, applications for and receipt of disability benefits, and Henderson's participation in pageants. The Government had no way of knowing with one-hundred percent certainty how documents and records would be maintained (i.e. in hard copy or electronically) or where they would be found in a box or a file or on a computer). Under these circumstances, the Government could not have described with more particularity the evidence or where it would be exactly located. See United States v. Triumph Capital Group, Inc., 211 F.R.D. 31, 58 (D. Conn. 2002) (citations omitted) (finding that the search warrant pertaining to a computer was sufficiently particular given that "the government had no way of knowing what information would be found on the laptop computer and thus could not have described more precisely the form of the evidence and the exact location on the hard drive where it was located „ . and that a more particular description could [have] precluded effective investigation of the crimes at issue."); see also Kail, 804 F.2d at 445 (citation omitted) (noting that particularity is satisfied if the items to be seized are as specific as the circumstances and nature of the activity under the investigation permit). On this basis, this Court finds that the Ramsey County Warrant should not be suppressed for lack of particularity.

4. Federal Warrant – May 24, 2003 for the Residence located at 3360 Crestmoor Drive, Woodbury, Minnesota residence

The Federal Warrant issued by Magistrate Judge Franklin L. Noel, gave law. enforcement officers permission to search for the following items in Attachment A to the warrant:

1. Bank Statements in the names of Denise Henderson; Kenneth Henderson; Crowning Moment's Inc.; Queen Bears Closet, Marketing that Works, Doctor's

Wellness Centers.

2. Records of receipts including any journals or ledgers from the aforementioned entities.

3. Receipts of expenses of the aforementioned entities.

4. Invoices of supplies of the aforementioned entities.

5. Profit and loss statements from the aforementioned entities.

6. Correspondence with tax organizations, i.e., the Internal Revenue Service and the Minnesota Department of Revenue.

7. Monthly state sales tax forms.

8. Yearly tax returns.

9. Checking accounts and/or other bank account information pertaining to the aforementioned entities.

10. Records of employment including job applications, records of earnings, and the IRS forms 940 and 941.

11. Business and/or corporate records as they pertain to the aforementioned entities.

12. Records of loans from the aforementioned entities.

13. Other miscellaneous business records related to the aforementioned entities.

14. Records which appear on any and all computers which are located in the house, to include the hard drive and

any disks which are located in the house.

15 Other evidence of Denise Henderson's active participation in business activity, including the proceeds relating to those businesses.

See Gov't. Ex. C.

Henderson asserts that Items 8, 10, 14 and 15 violated the particularity requirements of the Fourth Amendment because they were not limited to Henderson's alleged business activities, her participation in pageants or any other activities Identified in the supporting Affidavit Id. at p. 12. Henderson also argues that these categories of items for seizure were too broad because "the searcher had total discretion to decide what the evidence listed could be and rummage anywhere in the residence to find whatever the searcher might decide to search for." Id.

a. Yearly tax returns, records of employment and earnings, and other evidence of Henderson's active participation in business activity, including proceeds relating to those businesses

This Court finds that the description in the Federal Warrant as to the yearly tax returns, records of employment and earnings and other evidence of Henderson's active participation in business activity, including proceeds relating to those businesses, were sufficiently particular to preclude the exercise of any illegal discretion by executing officers. A warrant naming only a generic class of items may suffice if the individual items to be seized cannot be more precisely identified at the time that the warrant is Issued. United States v. Horn, 187 F.3d 781, 788 (8th Cir. 1999) (citing United States v. Johnson, 541 F.2d 1311, 1314 (8th Cir. 1978) (per curiam)). Henderson's work activity is central to this case. If a

claimant is currently engaged in substantial gainful employment the claimant is not disabled for the purposes of receiving Social Security Disability benefits. See 42 U.S.C. § 1382c. In addition, as set forth in the affidavit accompanying the application for the warrant, Henderson was involved In business activities with her husband, Kenneth Henderson. See e.g., Gov't. Ex, C (Affidavit of Jane M. Lewis ("Lewis Aff."), ¶ 12). Given that there was probable cause to believe that Henderson was operating businesses and competing in pageants when she claimed she could not work, much less sit, stand or walk for over 20 minutes at a time, see Section II B.4, infra, this Court does not find that the search warrant for yearly tax returns, employment records, or other records of Henderson's business activity to be overly broad.[11] Therefore,

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[11] Henderson argues in her reply memorandum that the authorization for seizure of tax records and records of employment and earnings was overbroad as it was not limited to the years in which Henderson sought disability benefits. See Defendant's Reply Memorandum of Law In Support of Pre-Trial Motions ("Def.'s Reply") at pp. 4-5. "[T]he absence from the warrant of a provision limiting the search and seizure to documents pertaining to the time period of the scheme [does] not make the warrant 'so facially deficient' Las to render official belief in its [legality] entirely unreasonable.'" U.S. v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents ($92,422.57), 307 F.3d 137, 151 (3rd Cir. 2002) (quoting United States v. Hodge, 246 F.3d 301, 308 (3rd Cir. 2001)); see also Triumph Capital, 211 F.R.D. at 58 (finding that the absence of a temporal limitation does not automatically render a warrant a prohibited general warrant). Further, in this case, the officer who executed the search warrant, Special Agent Lewis, was the affiant for the supporting Affidavit. Special Agent Lewis specifically stated in her Affidavit that the "[i]nformation seized will cover the period from June 1996 (Denise

this Court rejects Henderson's contention that Items 8, 10 and 15 of Attachment A to the Federal search warrant should be suppressed for lack of particularity.

b. Computer Records

Item No. 14 to Attachment A of the Federal Search Warrant allowed law enforcement officers to seize:

> Records which appear on any and ail computers which are located in the house, to include the hard drive and any disks which are located in the house.

See Gov't. Ex. C. There is nothing in the language of this paragraph that limits the search of computers to evidence related to the crimes at issue in this case, or describes what sort of evidence can be seized.

In Kail, supra, the Eighth. Circuit dealt with a warrant that authorized the seizure of:

> (1) evidence of mailings of coins in bullion shipments;(2) books, records, papers and documents relating to the sale and purchase of coins and bullion; (3) accounting ledgers or records, checkbooks, monthly statements, cancelled checks, and deposit slips; (4) inventory records, records of safety deposit boxes, safety deposit keys and coins; and (5) customer files,

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Henderson's eligibility date fro SSA purposes) to the present" See Gov't. Ex. C, Lewis Aff. 27. Thus, although the Affidavit was not Incorporated into the Federal Warrant, see discussion, infra, this Court finds that the executing officer, given the specificity of her Affidavit, had a good faith belief that she could validly seize documents from 1996 to the present.

> client lists, letters and mailings from clients, checks, cash, coins or bullion shipments sent as payment for purchases and advertising materials.

Kail 804 F.2d at 444-45. The Eighth Circuit held that "it would not be possible through a more particular description to separate those business records that would be evidence of fraud from those that would not since there was probable cause to believe that fraud permeated the entire business operation.[12]

Here, the plain language of the search warrant allows for all records to be seized from computers and disks located in the house. Unlike Kail, it was possible in this case to limit the search warrant to particular classifications of records located on computers and disks. This is evidenced by Items 1 through 13 of Attachment A, which limited other items to be seized to those bearing on Henderson's employment and business activities, areas which are inherently suspect as Henderson represented that she could not engage in those activities. In addition, the computer and disk files are not per se suspect, nor is there any evidence that Henderson's fraud permeated her entire computer. Item 14 of the Federal Warrant allows for "general rummaging" through the files located on computers and disks seized at the 3360 Crestmoor Drive residence; what may be seized off of the computers,

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[12] In Kail, postal inspectors were investigating complaints of mail fraud where it was alleged that defendant sold coins based upon the representations that the coins would be an excellent investment vehicle and that the coins were sold at their fair market value. Id. at 443. Subsequent appraisals of the coins purchased by the dealer's clients demonstrated that many of the coins were sold at a price well in excess of the fair market value, rendering the coins useless as an investment. Id. at 443-44.

hard drives, and disks is left to the discretion of the executing officer. See In re Grand Jury Proceedings, 716 F2d 493, 497 (8th Cir. 1983) (citing Anderson v. Maryland, 427 U.S. 433, 467 (1976) (citation omitted)). As such, this Court finds that Item 14 of Attachment A to the Federal Warrant relating to the search of computers and disks, runs afoul of the particularity requirements of the Fourth Amendment.

In order to overcome Henderson's contention that the Federal Warrant's request for all computer records was too broad, the Government argues that Henderson's utilization of computers in conducting her unreported business activities was specifically identified in the supporting Affidavit. See Gov't. Posthearing Mem. at p. 16. It is true that the Affidavit submitted by Special Agent Lewis, in support of the Federal Warrant provided, stated with specificity that Henderson was engaged In computer activity and linked it to the 3360 Crestmoor Drive residence. See Gov't. Ex. C, Lewis Aff., ¶¶ 13-16 (listing a variety of websites operated by Henderson which direct the mailing of pageant entry forms to Henderson at the Crestmoor Drive residence and provide for email addresses for Henderson). It is also true that a search warrant may incorporate applications and supporting affidavits for the purpose of establishing particularity if the warrant uses appropriate words of incorporation and if the supporting documents accompany the search warrant when it is executed. See Groh, 124 S.Ct. at 1290. However, here, the Federal Warrant does not in any way incorporate the Affidavit. Rather, the only reference to the Affidavit is in connection with the support provided to the Magistrate Judge for probable cause. An affidavit is not incorporated where the search warrant only stated that the affidavit was provided-to the issuing magistrate and that it provided probable cause. See United States v. Curry, 911 F.2d 72, 77 (8th Cir. 1990), cert. denied 498 U.S. 1094 (1991) (finding that the following was insufficient to incorporate an affidavit into a search warrant:

"[w]hereas, the application and supporting affidavit of Det. Ross Swanson (was) (were) duly presented and read by the Court, and being fully advised in the premises. . . ."); see also United States v. Strand, 761 F.2d 449, 453-54 (8th Cir. 1985) (finding that the following portion of a search warrant did not in any way incorporate the affidavit: "'[a]ffidavit(s) [have] been made' and that 'grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).'"). Therefore, since the Federal Warrant did not incorporate the contents of the Special Agent Lewis' Application and Affidavit, and there was no evidence presented that these supporting documents accompanied the executing officers on their search, this Court cannot consider the Application or the Affidavit in determining whether the request to search for any computer records is sufficiently particular to pass muster under the Fourth Amendment.

In addition, this Court rejects the Governments arguments that the seizure of all computer records was proper based on the plain view doctrine, or, because any computer use by Henderson "is itself evidence that Henderson's claims regarding her physical capabilities is false." See Gov't. Posthearing Mem. at p. 16.

Under the plain view doctrine, an officer need not have a warrant to conduct a search if the officer's conduct meets three criteria: 1) the officer must be legitimately at the vantage point .where he or she plainly views the evidence; 2) the incriminating nature of the object seized must be immediately apparent to the officer; and 3) the officer must have a legal right of access to the object. See United States v. Beatty, 170 F.3d 811, 81.4. (8th Cir. 1999) (citation omitted). Here, while the actual computers and disks may have been in plain view, their contents were not. See United States v. Lemmons, 282 F.3d 920, 925 n. 5 (7th Cir. 2002); Cf , United States v. Jackson, 576 F.2d 749, 753 (8th Cir. 1978), cert.

denied, 439 U.S. 858 (1978) (finding that the plain view doctrine cannot be used "as justification for rummaging through file cabinets, . . ."). As such, the "plain view" doctrine cannot apply to render the seizure of all computer records valid.[13]

The contention that the Government was entitled to seize computers and their records because evidence of Henderson's use of computers bore on her claims regarding her physical capabilities also fails. In the Affidavit accompanying the warrant, Special Agent Lewis stated she was seeking computer records which "may contain any of the information described above [referring to all documents or records showing income earned, monies received or payments made to Denise Henderson, or Kenneth Henderson, all

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[13] The Government cites to United States v. Fitzgerald, 724 F.2d 633 (8th Cir, 1983), in support of its assertion that a seizure of an item from an overbroad search, may be properly seized under the plain view doctrine. Fitzgerald is inapposite. The first issue before the Court in Fitzgerald was whether the invalidity of certain portions of a warrant rendered the entire warrant wholly invalid, or whether the non-particular portion could be severed from the warrant. Id. at 635-36. The second issue before the Court was, given its determination that that the redacted warrant was valid, whether three firearms not listed in the warrant were properly seized under the plain view doctrine. The Fitzgerald case is distinguishable from the present case because in that case the items seized in' plain view were not listed in the search warrant, whereas in this case, the records on computers, hard drives, and disks were listed In the search warrant. In other words, Fitzgerald, did not address the issue of whether an item rejected in a search warrant because it was not described with sufficient particularity, can nonetheless be validly seized if it was in plain view.

statements from banks or other financial institutions, all cancelled checks, credit card or credit account applications and receipts in the name of Henderson, her husband, Crowning. Moments, Inc,, Queen Bear's Closet, Marketing That Works, and The. Doctors Wellness Center, and all receipts for business expenses]:" See Govt. Ex. C, Lewis Aff. ¶ 27. Nowhere in her Affidavit did Special Agent Lewis state she was seeking computer records simply to show Henderson's use of the computer. The whole point of the seizure was to find substantive evidence within the computer records that would support the Government's charges of social security fraud, not the generalized use of the computer itself to generate those records.

Notwithstanding this Court's finding that Item 14 of the Federal Warrant was overly broad, this Court does find that based on the good faith exception articulated in United States v. Leon, 468 U.S. 897 (1984), the computer-related items seized pursuant to the Federal Warrant, should not to be suppressed.

Under Leon, the "Supreme Court noted that certain situations would negate a belief that an officer acted with objective, reasonableness: (1) if a judge or magistrate' in issuing a warrant was misled by an affidavit the affiant knew or should have known was false; (2) if a judge or magistrate has wholly abandoned the judicial role and merely serves as a rubber-stamp for police; (3) if the affidavit supporting the warrant so lacked probable cause as to render official belief in its validity unreasonable; or (4) if a warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid. See Leon, 468 U.S. at 923. The Eighth Circuit has interpreted this to mean that the Leon "good faith" exception is not automatically inapplicable to every case where a search warrant is found to lack particularity. See Curry, 911 F.2d at 77 (citing Massachusetts v. Sheppard, 468

U.S. 981, 988-91 (1984)) (citations omitted); see also United States v. Thomas, 263 F.3d 805, 808 (8th Cir. 2001).

There are several factors justifying the application of the Leon exception to this case. First, there was no evidence presented by Henderson that Agent Lewis acted in bad faith. See Thomas, 263 F.3d at 808-09 (citing Curry, 911 F.2d at 78) (finding that the lack of evidence of bad faith on a law enforcement officer weighed in favor of applying the Leon exception in a case where the search warrant was insufficiently particular).

Second, there was no evidence presented to suggest that Magistrate Judge Noel was not a "neutral and detached" magistrate judge at the time he issued the warrant.

Third, the supporting Affidavit provided probable cause for the search of the computers. See section II.B.4, infra.

Fourth, the Federal Warrant was not so facially deficient that Special Agent Lewis could not reasonably presume it was valid. To the contrary, Special Agent Lewis, in her Affidavit, not only linked Henderson and Henderson's computer activity to the 3360 Crestmoor Drive residence as it pertained to her role in running various different pageants, and an internet business, but she limited her description of evidence to be found at the residence to that which bore on Henderson's business activities. In this regard, Agent Lewis explicitly stated in paragraph 27 of her Affidavit:

> Based on this information and the results of the investigation to date, I believe that Denise Henderson is engaged in work activity and produces income that she does not report to the SSA or the Internal Revenue Service. I believe that located at the premises noted

> above are fruits, evidence and instruments of criminal offenses against the United States including, but not limited to, defrauding SSA by making false statements in order to fraudulently receive Social Security disability benefits, conspiracy to defraud SSA, including but not limited to violation Title 42, United States Code Section 408(a)(4). This evidence includes, but is not limited to, records and documents include but are not limited to (sic]: all documents or records showing income earned, monies received 'payments made to Denise Henderson, or Kenneth Henderson, all statements from banks, credit unions or other financial institutions; all cancelled checks, credit card or credit account applications and credit card receipts in the name of Denise Henderson, or Kenneth Henderson, Crowning Moments, Inc., Queen Bear's Closet, Marketing That Works, and The. Doctors Wellness Center, all receipts. for business expenses of business memorandum; and computer. or electronic record storage devise which may contain any of the information above described. The terms 'documents' and 'records as used in this affidavit include all files, data, documentary evidence and information, whether in paper form or stored on . . . computer, electronic or other media.

See Gov't. Ex. C, Lewis Aff. 27 (emphasis added).

Special Agent Lewis, was not only the affiant for the Federal Warrant, but she also executed the warrant. See Gov't. Ex. C (warrant directed the search to Special Agent Lewis and the inventory forms were filled out by her) "This fact is significant because in assessing whether reliance on a search warrant was objectively reasonable under the totality of the circumstances, it is appropriate to take into account the knowledge that an officer in the searching officer's position

would have possessed_" See Curry, 911 F.2d at 78 (citing Sheppard, 468 U.S. at 989 n. 6; see also Thomas, 263 F.3d at 808 (citing Curry, 911 F.2d at 78); United States v. Berry, 113 F.3d 121, 124 (8th Cir. 1997) (citing same). Although an affidavit's specificity does not cure a defect warrant when it is not incorporated into the search warrant, it can provide the affiant a good faith basis to execute a search warrant at a residence. See e.g., United States v. Bloom, 242 F.3d 799, 807 (8th Cir. 2001) (citing Curry, 911 F.2d at 76-78; Sheppard, 468 U.S. at 989 n. 6); Thomas 263 F.3d at 808 (finding that the fact the search warrant was executed by the affiant, even though the affidavit was not incorporated into the search warrant, to weigh in favor of applying the Leon exception).

Finally, this Court finds that the supporting Affidavit when read in combination with the entirety of Attachment A of the Federal. Warrant, would have given. Special Agent Lewis an objective and reasonable basis for believing Item 14 was valid. See United States v. Conley, 4 F.3d 1200 (3rd Cir. 1993), cert. denied 510 U.S. 1177 (1994) (finding that "the phrases in a search warrant must be read in context and not in isolation." Id. (citing United States v. Johnson, 690 F.2d 60, 64 (3rd Cir.1982), cert. denied, 459 U.S. 1214 (1983), citing Andresen, 427 U.S. at 479-482))

In this case, Items 1 through 13 of Attachment .A of the Federal Warrant pertained to the various businesses owned by Henderson and her husband, their financial information, employment records and tax-related documents. A law enforcement officer, in this case Special Agent Lewis, reading the thirteen items preceding Item 14 in Attachment A in conjunction with the Affidavit which supported the Attachment, could reasonably believe that the search warrant was limited to the seizure of files from the computers, hard drives, and disks that evidenced the information listed in

items 1 through 13 of the Warrant.

For all of these reasons, this Court finds that Special Agent Lewis had good cause to believe that she had the authority to search for records on computers, hard drives and disks related to the business activities and financial status of Henderson, her husband and the four companies named in Attachment A of the Warrant. Therefore, even if the search and seizure of the records on computers, hard drives, and disks violated the particularity requirement of the Fourth Amendment, the evidence is admissible under the good-faith exception to the exclusionary rule.

B. Probable Cause

Henderson contends that all three search warrants must be suppressed because their supporting affidavits do not provide sufficient probable cause.

1. Standard of Review

Ordinarily, searches pursuant to a warrant are reviewed to determine if there was probable cause for the search in the search warrant application and affidavit. Illinois v. Gates, 462 U.S. 213, 236 (1983). "Probable cause exists when, given the totality of the circumstances, a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place." United States v. Fladten, 230 F.3d 1083, 1085 (8th Cir. 2000) (citation omitted).

The task of a court issuing a search warrant is "simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit... including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband

or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238 (emphasis added). In reviewing this decision of the issuing court, the duty of this Court is simply to ensure that the issuing court had a substantial basis for concluding that probable cause existed. Id. at 238-39 (citation omitted). "[P]robable cause may be established by the observations of trained law enforcement officers, or by circumstantial evidence." United States v. Searcy, 181 F.3d 975, 981 (8th Cir. 1999) (citations and internal citations omitted). Therefore, the review of this Court is limited to whether the issuing court had a substantial basis for concluding, based on all the circumstances set forth in the affidavit, that there was a fair probability that contraband or evidence of a crime would be found inside of the five packages. See Gates, 462 U.S. at 238-239.

2. Washington County Warrant – May 17, 2000, Search Warrant for 12425 53rd StreetNorth Bayaort Township

Henderson states in her motion to suppress that all of the search warrants in this case lacked probable cause in the supporting affidavits for their issuance. However, Henderson's memorandum of law only claimed that the Washington County Warrant lacked probable cause because the supporting affidavit "did not even explain why it was probable that Ms, Henderson had a computer, and why, if she did, it was probable that it contained evidence of fraud." See Def.'s Memo. at p. 16. In support of this argument Henderson contends that the reference in the supporting affidavit to the affiant's training and experience, is not enough to establish probable cause. Id.

The Affidavit in support of the Washington County Warrant provided a substantial basis for concluding that probable cause existed because it provided the required nexus

between the residence and the illegal activity. The November 8, .2000 Application and Supporting Affidavit to the warrant, submitted by Deputy Zafft, provided that Henderson resided at the 12425 53rd Street North Bayport Township residence. In addition, the Affidavit stated that Henderson claimed to operate several businesses from this residence including "Marketing that Works" and "Doctors Diet Clinic" or "Doctors Wellness Clinic."

The Affidavit also provided evidence, in the form of Henderson's submissions and representations to the SSA as to her physical condition and her inability to perform various activities. Specifically, the Affidavit listed Henderson's May 1997 representation that she could not sit, walk, or stand for 20 minutes, that her functional capacity was below a sedentary level, and that she suffered from chronic pain and vertigo. See Gov't. Ex. A at p. 6. In addition, the Affidavit stated that in February of 1998, Henderson submitted another form to the SSA claiming that her disability had worsened, and that she had not worked since her initial request for disability payments. Id. Further, the Affidavit stated that she alleged that her migraines had gotten worse, that she could not concentrate, that she had shooting pain down her legs, that she could not sit for more than 20 minutes, could not lift more than 5-7 pounds, could not use her right hand, that she got migraines more than five times a week and that it took her more than an hour to shower and curl her hair. Id. The Affidavit also alleged that Henderson submitted a report to the SSA, on March 27, 2000, claiming that her disability had gotten worse, that she suffered a lack of concentration, dizziness, vertigo, chronic migraines, numbness in the hand, head aches, back aches and chronic pain. Id. Moreover, the Affidavit stated that Henderson claimed that she "gets" dizzy causing her to have to hold onto a wall or counter to steady herself, that she could not watch a movie, as she could not sit for more than 20 minutes, and that she still could not work.

Id.

The Affidavit of Deputy Zafft then set forth all the activities that Henderson was engaged in during the period she alleged that she was disabled. In particular, In her 1996 application for adoption, Henderson claimed that she worked at "Marketing That Works Inc." located at the 12425 53rd Street residence, making more that $50,000 a year. Id. at p. 7. In addition, she answered "Non to the question in application of whether she had any chronic or disabling conditions that limited her daily activities, and provided a notarized statement by her doctor that stated that she did not have a condition that would be a contraindication to adoption. Id. Further, the Affidavit described a July 26, 1996 adoption home study which stated that Henderson was very athletic, that she was in good physical condition, that she was able to keep her home beautifully decorated, and that she darned that she had an annual income of $50,000 a year. Id.

The Affidavit of Deputy Zaftt, further described that observations of Henderson engaging in a variety of activities. For example, on September 19, 1998, Henderson was observed spending over three hours at a soccer game sitting down in a chair, carrying a folding chair, lifting a little girl and placing her into her lap, picking up the girl, kicking a ball and squatting with no difficulty at all. Id. at p. 4.. On November 25, 1998, she was observed squatting down to put air into her car's tires, shopping, and was seen carrying several large bags. Id. at p. 5. On January 16, 1999, she was observed walking around the Minneapolis Convention Center at the Minnesota Women's Expo; where she was a speaker.. Id. On January 27, through February .6, 1999, Henderson was observed going on vacation with her family to Hawaii, and was seen bending, squatting, carrying various items such as suitcases, back packs and strollers. Id. On March 17 to March 22, 1999, Henderson competed in and won the "Mrs.

Minnesota" Contest. Id. In addition, Henderson was seen on an Infomercial for the "Doctor's Wellness Center," in which she was identified as the owner. Id. On March 17, 2000, law enforcement officers observed Henderson's participation in the 2000 "Mrs. Minnesota" Contest.

In sum, the supporting Affidavit of Deputy Zafft connected Henderson to the 12425 53rd Street residence that was the subject of the search warrant. In addition, the supporting Affidavit provided probable cause to believe that Henderson was engaged in activities that amounted to defrauding the SSA. Further, the Affidavit connected the 12425 53rd Street residence to Henderson's alleged business activities. For all of these reasons, this. Court finds that the facts and circumstances set forth in Deputy Zafft's Affidavit, taken as a whole, supports the finding of probable cause to issue the search warrant for records and items related to the financial status of Henderson, the businesses she was involved in, her participation beauty pageants, and items relating to her physical condition.

Henderson's specific claim that there was no probable cause to believe that there were computers at the Washington County residence or probable cause to believe that any of the computers at the residence contained evidence of fraud is also without merit. The Washington County Warrant sets out the specific types of documents housed within the residence to be located. The request for computer records was simply included in the preamble of the search warrant to identify where specific records might be found—i.e., the computer.

The alleged fraud Henderson is accused to have committed pervaded her whole life. Not only was her residence central to her personal life, but the Affidavit also alleged that Henderson ran businesses from the residence when she claimed she could not work. Once there was

probable case to believe that the residence contained evidence of Henderson's alleged crimes, officers were entitled to search any storage facility that housed the evidence, including boxes, file cabinets, folders, closets, drawers and computers.[14] As such, Henderson's motion to suppress the Washington County Warrant for lack of probable cause should be denied.

3. Ramsey County Warrant — May 17, 2000 Search Warrant for Offices and Automobiles Located at 2353 Rice Street Suite 203 Roseville Minnesota

Henderson generally asserts in her motion to suppress that the Affidavit supporting the Ramsey County Warrant provides no specific facts establishing probable cause to support the warrant. In addition, Henderson claims that the Ramsey County Affidavit alleges no evidence of fraudulent activity to be found on a computer or that Henderson even has a computer and storage media.

Here, the Affidavit presented to the issuing court by Deputy Zafft included the virtually the same information regarding the disability alleged by Henderson and her business and personal activities, as was included in Deputy Zafft's Affidavit supporting the Washington County Warrant, supra. In addition, the Affidavit stated that Henderson claimed to operate a business known as the "Doctors Diet Clinic" or the "Doctors Wellness Clinic" with her husband. Kenneth Henderson, and that the offices for these buinsess were located at 2353 Rice. Street, Suite 203, Roseville, Minnesota.

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[14] Henderson has not claimed that officers lacked probable cause to search file cabinets, drawers, or boxes in the residence for all of the items listed in the warrant. Search of a computer for these same records is no different.

For all the reasons stated in this Court's discussion of probable cause supporting the Washington County Warrant, the facts and circumstances set forth in Officer Zafft's Affidavit, taken as a whole, support the finding of probable cause to issue the search warrant for the offices located at 2353 Rice Street, Suite 203. Further, for the same reasons, Henderson's claim that the Ramsey County search warrant did not contain probable cause to seize records from computers has no merit. Henderson's motion to suppress the Ramsey County Warrant based on lack of probable cause should be denied.

4. Federal Warrant – May 24, 2003 for the Residence located, at 3360 Crestmoor Drive Woodbury, Minnesota residence

It is Henderson's position that the supporting Affidavit for the search warrant pertaining to the 3360 Crestmoor Drive residence does not provide sufficient probable cause for seizure of the items sought in the warrant. Further, Henderson asserts that that Affidavit did not establish probable cause to search the computer and storage media located in the residence. In opposition, the Government argues that Henderson's utilization of computers in conducting her unreported business activities was specifically identified in the supporting Affidavit.

The Affidavit of Special Agent Lewis sets forth Henderson's history with the SSA. In particular, it provides, as did the state search warrants, that in April of 1997 Henderson applied for social security disability benefits, as a result of a disability that arose out of a December 1995 automobile accident. See Gov't. Ex. C at p. 2. According to Agent Lewis, Henderson claimed to an AU that that she suffered from chronic pain, vertigo, right carpal tunnel

syndrome, poor mandibular joint disorder, and migraine headaches. Id. In addition, the Affidavit stated that Henderson completed and signed a Report of Continuing Disability on May 3, 2002, in which she claimed that her condition had changed for the worse and that she did not consider herself able to return to work. Id. at pp. 2-3. Her claimed ailments included migraine headaches three times per week, neck and back pain, and numb fingers In her right hand. Id. at p. 3. Special Agent Lewis also stated that individuals receiving disability benefits are required to report to the SSA any changes on their disability status and any work activity or income to the SSA. Id. at p. 1 Agent Lewis also attested that lap no time since she began receiving disability benefits has HENDERSON reported any work activity or income." Id. at p. 3.

The Affidavit then set forth the alleged work activity of Henderson. From March 17 through 22, 1999, Henderson competed and won the "Mrs. Minnesota international" pageant. Id. From, August 20 through August 29, 1999, Henderson competed in the Mrs. U.S. international pageant in Texas where she finished in the top ten. Id. In June of 2001, Henderson competed in and won the Mrs. Iowa International Pageant. Id. The Affidavit also alleged that prior to her 1995 accident, Henderson operated a company out of her home called "Marketing that Works." Id. The corporation, at time the warrant was issued, was still listed as active and Henderson was listed as the CEO, although all earnings were posted to her husband's record. Id. In addition, it was alleged that Henderson participated in the "The Doctor's Wellness Centers." Id. Three former employees of the Centers claimed that Henderson was involved with running these businesses and was considered to be the manager for the one of the offices for six months. Id.

The Affidavit submitted by Special Agent Lewis, also

sets out Henderson's participation in Crowning Moments Inc., which coordinated and sponsored two beauty pageants in Iowa and one in Minnesota. According to Special Agent Lewis, Henderson's participation in Crowning Moments Inc. was evidenced by Henderson's maintenance and operation of websites relating to this company. Id. In particular, websites pertaining to the Mrs. Iowa International Pageant and Miss Teen Minnesota Pageant listed Denise Henderson as the Director of the pageants. The Miss Teen Iowa International Pageant website provided that entry forms were to be sent to Denise Henderson at the 3360 Crestmoor Drive residence and provided an email contact at dhenderson@missteeniowa.us. Id. The website for Mrs. Iowa International Pageant required individuals to send entry forms to Henderson at Crowning Moments, Inc., located at 3360 Crestmoor Drive. Id. at pp. 3-4. The Miss Teen Minnesota website provided that to enter the pageant, forms must be sent to the 3360 Crestmoor Drive address and provided an email address contact of dhenderson@missteenminnesota.us. Id. at p. 4. Special Agent Lewis stated that it was her belief that Henderson maintains and operates these websites, as all three websites contained her photographs, the websites listed the address to send applications as 3360 Crestmoor Drive, Woodbury, MN, 55125, and the websites provided links to Henderson's website regarding the adoption of her daughter Amanda. Id. at pp. 3-4.

In addition, the Affidavit stated that Henderson maintained a web site at www.queenbearscloset.com, which offered for sale items to individuals participating in pageants. Id. at p. 4. Special Agent Lewis stated that she and another agent ordered protein drinks and bars from this website. Id. In response, they received an email from Henderson stating that she would place the items in the mail that day. Id. The contact information for the website was listed as the 3360 Crestmoor Drive residence. Id.

Finally, Special Agent Lewis asserted that in her experience as special agent for the SSA, that individuals often maintain within their personal residences evidence of their assets and personal financial information including tax returns, bank account. information, and information regarding businesses that they operate, and that individuals and businesses have computer accounting programs to maintain such records. Id. at p. 5.

The facts and circumstances set forth in Special Agent Lewis' Affidavit, taken as a whole, support the finding of probable cause to issue the search warrant for the 3360 Crestmoor Drive residence, including the computer, hard drives, and disks contained therein. Further, the Affidavit contains' sufficient probable cause to believe that computers would be located in the residence and that they were being used by Henderson for her various business activities and for financial purposes. Henderson's motion to suppress the. Federal Warrant based on lack of probable cause should be denied.

C. Issuance and Execution of May 17, 2000 Ramsey County Search Warrant

Henderson has moved to suppress the evidence and derivative evidence obtained as a result of the Ramsey County Warrant on the grounds that the affiant and the person who executed the warrant was a Washington County Deputy Sheriff, not a Ramsey County peace officer. See Defendant's Supplemental Motion to Suppress Evidence and Derivative Evidence Obtained as a Result of the Ramsey County Warrant. According to Henderson, this violates not only Minnesota law governing the issuance and execution of search warrants, but the reasonableness requirement of the Fourth Amendment.

It is undisputed that the affiant for the application and supporting affidavit for the Ramsey County Warrant was Deputy Larry Zafft, a Washington County law enforcement officer. It is also undisputed that the Ramsey County Warrant was issued to "Officer Guy of the Roseville Police Department, and Deputy Scott Stillman, Washington County Sheriff's Office, Minnesota Peace Officers, and federal officers under their direction and control," and the "Receipt, Inventory and Return" sheet for the Ramsey County Warrant was filled out by Deputy Zafft and stated that he was the one who executed the warrant." See Gov't. Ex. B.[15]

Henderson argues that the Ramsey County search warrant must be suppressed because it did not comply with Minn. Stat. § 626.11 (2000), which provides in relevant part:

> If the judge is satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, the judge must issue a signed search warrant, naming the judge's judicial office, to a peace officer in the judge's county or to an agent of the bureau of criminal apprehension. (emphasis added)

Henderson's interpretation of the statute is misplaced. The four corners of the Ramsey County Warrant stated that it was issued to both Roseville Officer Guy and Deputy Stillman of the Washington County Sheriff's Office, along with other officers under their control and direction. Based on

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[15] The Government states in its post-hearing memorandum that the Ramsey County search warrant was also executed by Roseville police Officers Joseph Guy and Bob Hawley. See Gov't. Posthearing Mem. at p. 8 n. 3. However, this "evidence" was not presented to the Court at the hearing or via sworn affidavit

the language of the warrant, this Court finds that the Ramsey County Warrant was issued to both Ramsey County and Washington County law enforcement officers, and therefore, complied with the requirements of Minn. Stat. § 626.11.

However, even if this Court were to conclude that issuance of the Ramsey County Warrant to two officers, only one of whom was from Ramsey County, was a violation of Minn. Stat. § 626.11, the procedural violation of Minnesota state law does not lead to the suppression of evidence arising from the Ramsey County Warrant. The general rule is that "federal courts do not suppress evidence seized by, state officers in conformity with the Fourth Amendment because of state law violations." United States v. Appelquist, 145 F.3d 976, 978 (8th Cir. 1998) (citing United States. v. Bieri, 21 F.3d 811, 816 (8th Cir.), cert. denied, 513 U.S. 878 (1994)); see also United States v. Bach, 310 F.3d 1063, 1066 (8th Cir. 2002) ("[F]ederal courts in a federal prosecution do not suppress evidence that is seized by state officers in violation of state law, so long as the search complied with the Fourth Amendment.") (citation omitted); United States v. Maholy, 1 F.3d 718, 721 (8th Cir. 1993) ("When evidence obtained by state law enforcement officers is offered in a federal prosecution, 'the legality of [the] search and seizure is not determined by reference to a state statute, but rather is resolved by fourth amendment analysis.") (quoting United States v. Tate, .821 F.2d 1328, 1330 (8th Cir. 1987)) (citations omitted)[16]

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[16] The Minnesota Court of Appeals reached the same result as the federal courts in State v. Lunsford, 507 N.W.2d 239, 243 (Minn. Ct. App. 1993) (finding that "[A]lthough the search warrant was improperly Issued and executed [pursuant to Minn. Stat. § 626.11, we conclude this statutory violation does not warrant exclusion of the resulting evidence. The exclusionary rule does not apply to technical violations of the

Nevertheless, Henderson argues that issuance of the Ramsey County Warrant to Officer Guy still violates the reasonableness requirement of the Fourth Amendment because in reality it was Deputy Zafft who obtained and executed the warrant, in essence on "non-peace officer." See Def.'s. Reply at p. 2. In this regard, Henderson argued that Deputy Zafft was not only the affiant for the warrant, he was the, applicant for the warrant, and he executed it, as evidenced by his signature on the inventory from the search. Id. In addition, Henderson argued that while the warrant was issued to Officer Guy, nothing in the warrant or the papers that accompanied it, gave any indication that he had anything to do with obtaining it. Id. Consequently, Henderson contended that it was "obviously part of the Fourth Amendments reasonableness requirement that search, warrants be obtained and executed by persons authorized to carry out law enforcement functions in the jurisdiction where the warrant was obtained and where it is to be executed. It has never having [sic] been the practice to let civilians obtain and execute warrants." See Defs Memo. at p. 29.

This Court does not find Henderson's argument persuasive. First, Deputy Zafft is a Minnesota law enforcement officer and there has been no evidence offered by Henderson to show that he was acting outside the scope of his employment at the time the search warranted was issued and executed. Second, this Court has already found that the Ramsey County Warrant complied with the Fourth. Amendment because it was supported by probable cause and because it was sufficiently particular. See Sections II.A.3, 11.8.3, supra. Third, this Court has determined that the

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statutes governing search warrants, where no constitutional violation is. involved.")

warrant was issued by a Ramsey County Judge for a search in his jurisdiction. Accordingly, even if this Court were to find that the Ramsey County Warrant was really issued to Deputy Zafft, and not Deputy Guy, as stated in the warrant; and that Deputy Guy had no role in its execution, no violation of the Fourth Amendment has been identified."[17] See e.g., Bach, 310 F.3d at 1066-67 (finding that the absence of an official presence during the execution a search warrant does not amount to an automatic violation of the Fourth Amendment); Guest v. Leis, 255 F.3d 325, 334 (8th Cir. 2001) (finding that the execution of a search warrant by individuals not named in a search warrant and not accompanied by authorized officials during the execution in its entirety was reasonable under the. Fourth Amendment); United States v. Green, 178 F.3d 1099, 1106 (10th Cir. 1999) ("The Fourth Amendment is satisfied where, as hem, officers obtain a warrant, grounded in probable cause and phrased with sufficient particularity, from a magistrate of the relevant jurisdiction authorizing them to search a particular location, even if those officers are acting outside their jurisdiction as defined by state law."). Whether the search was executed by Deputy Zeit, a Washington County law enforcement officer, or Deputy Guy, a Roseville peace officer, as stated in the Warrant, this Court can discern no violation of the Fourth Amendment. As such, for all of these reasons, Defendant's Supplemental Motion to Suppress evidence derived from the Ramsey County search warrant should be denied.

III. Motion for Return of Items Seized

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[17] This Court notes that the Minnesota Legislature amended Minn. Stat. §.626.11 in 2002, allowing a judge to issue a search wan-ant to a peace officer inside or outside the officer's jurisdiction. In other words, the Minnesota Legislature has deemed it appropriate to have a judge issue a search warrant to an officer outside of his/her jurisdiction.

Initially, Henderson requested in her Motion for Return of Items Seized that this Court order the Government to immediately return all items seized pursuant to all of the search warrants issued and executed in this case. The items at issue in this case were seized as a result of the three search warrants executed on May 18, 2000, and February 25, 2003. In response to this motion, the Government represented that it had returned many of the items seized, and as to the items it had retained, it had made them available for copying and inspection on January 12, 2004. See Govt Post-Hearing Mem. at p. 18 n. 5. Further, the Government represented that it needed the remaining items in its possession for use as evidence at trial. Id. at p. 19.

Subsequently, Henderson stated in her reply memorandum that she was willing to have the Government keep the originals so long as she received copies of the items seized. See Def.'s Reply. at p. 9. In addition, Henderson requested the return of those items the Government does not need for its case. Defs' Reply at p. 9. Henderson also argued that it was unreasonable for the Government to demand that she and her counsel be forced to go over the seized evidence in the presence of a federal agent for the purpose of selecting documents for copying, and that the Government's requirement that the agent perform the copying function was "unfair and violates Ms. Henderson's right to due process and to effective assistance of counsel". Id. at pp. 9-10.

On April 13, 2004, counsel for the Government submitted a letter to the Court again reiterating that items from the seizures had previously been returned to, Henderson_ In addition, Government outlined a copying procedure in which Henderson would be allowed to bring a photocopier into the U.S. Attorneys Office or hire an outside vendor to make copies in the discovery room. The

Government stated that a custodian would be present, but only to ensure the integrity of the evidence and not to interfere with the attorney-client communication.[18]

On. June 14, 2004, the Government sent a letter to the Court stating that the parties had entered an arrangement whereby the Government had made electronic copies of the computers and hard drives seized pursuant to the federal and state warrants, and the computers were thereafter returned to Henderson or have been made available to her for return. The Government also represented that remaining physical evidence in its possession (original documents, photographs and video recordings[19]) was needed for use at trial and was still available to Henderson for Inspection and copying.

In response to an inquiry by the Court regarding the impact of the stipulations with respect to the return of the computers to Henderson, Henderson's counsel responded in a June 21, 2004 letter to the Court, that he sought the return of "all of [Henderson] and her husband's items that were seized illegally." [20]

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[18] Counsel for the Government represented that Henderson's attorney had reviewed documents in other cases under such a procedure and had never complained .

[19] In its post-hearing memorandum, the Government stated that it had in its possession approximately three boxes of documents and video recordings, in addition to the computer equipment. See Gov't. Post-Hearing Mem. at p. 18 n. 5.

[20] In light of the Government's June 14, 2004 letter, this Court asked the parties to notify the Court whether the stipulations regarding return of, the computers and hard drives rendered moot Henderson's motion for suppression as it related to the computers and her motion for return of items seized.

Thus, in light of all of the above, it appears that the only issue to address with respect to Henderson's motion to return items seized is whether Henderson is entitled to return of the remaining items in the Government's possession, which the Government has represented it needs for trial.

"If a motion for return of property is made while a criminal prosecution is pending, the burden is on the movant to show that he or she is entitled to the property." United States v. Chambers, 192 F.3d 374, 377 (3rd Cir. 1999) (citing United States v. Martinson, 809 F.2d 1364, 1369 (9th Cir. 1987)). The general rule is that a motion for return for property is properly denied if the property is contraband, subject to forfeiture or if the Government's need for the property as evidence continues. Id. (quoting United States v. Van Cauwenberghe, 934 F.2d 1048, 1061 (9th Cir. 1991)); see also United States v. Beras, No. 99 CR. 75(SWK), 2003 WL 21.136727 at *1 (S.D.N.Y. May 16, 2003) ("The Government may retain seized property when it has 'possible evidentiary. value.") (quoting Haley v. United States, No. 01 Civ. 04843, 2002 WL 718059, *2 (E.D.N.Y. Jan. 22, 2002)). "Where ... the Government asserts in good faith that it requires seized property for use as evidence in related criminal proceedings, the Government may continue to hold the property while its need for the property as evidence continues.'" Beras, 2003 WL 21136727 at *1 (quoting Veqa v. United States, No. 00 Civ. 8920, 2001 WL 823874, "2 (S.D.N.Y. July 20, 2001) (citations omitted)).

With respect to Henderson's request that all items seized illegally be returned to her, her motion should be denied, as this Court has not found that any of the evidence seized from the 2000 and 2003 search warrants should be suppressed. Further, the Government has represented that it needs the items seized for use as evidence at trial. See Gov't.

Post-Hearing Mem. at p. 19; see also Letter from Joseph Dixon dated June 14, 2004. Based on these facts, Henderson has not met her burden to show that she is entitled to return of the property, However, to the extent that the Government determines that any of the remaining items in its possession will not be used at trial, It shall return such property to Henderson.

Further, the Court finds that Henderson's argument that it Is unreasonable to require that she and her counsel review seized documents in front of a Government agent, as a rationale for returning seized items, lacks merit. The Government asserted that it has made the evidence available for copying since January 12, 2004. Requiring that Henderson review original records in the presence of a custodian to ensure the integrity of the documents is reasonable, as is the copying procedure proposed by the Government. If Henderson wants to review copies of the items seized by the Government at her own leisure and outside the presence of a Government agent, she is free to bring in a copying machine or a vendor on site to make copies of all the items seized and later review them-t a different location.

For all of these reasons, Henderson's motion to return seized items should be denied.

RECOMMENDATION

For the reasons set forth above, it is recommended that:

1. Defendant's Motion, Unless Otherwise Dismissed as a Matter of Law, to Refer this Matter to an Appropriate Federal Agency under the Doctrine of Primary Jurisdiction [Docket No. 19] be **DENIED**;

2. Defendant's Motion to Suppress Evidence

Obtained as a Result of Search and Seizure [Docket No. 20] be **DENIED**;

3. Defendant's Motion for Return of Items Seized [Docket No. 28] be **DENIED**; and

4. Defendant's Supplemental Motion to Suppress Evidence and Derivative Evidence Obtained as a Result of the Ramsey County Warrant [Docket No, 30] be **DENIED**.

Dated: June 30, 2004

s/
JANIE S. MAYERSON
United States Magistrate Judge

Pursuant to Local Rule 72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties on or before July 13, 2004 a copy of this Report, written objections which specifically identify the portions of the Report to which objections are made and the bases for each objection.

Unless the parties stipulate that the District Court, is not required by 28 U.S.C. § 636 to review a transcript of the hearing in order to resolve all objections made to this Report and Recommendations, the party making the objections shall timely order and file a complete transcript of the hearing on or before July 13, 2004.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 03-437(DSD/JSM)

United States of America,

Plaintiff,

v.

Denise Marie Henderson,

Defendant,

This matter is before the court upon defendant's objections to the report and recommendation of United States Magistrate Judge Janie S. Mayeron, dated June 30, 2004. In her report, the magistrate judge recommends that defendant's motions for return of property, to suppress evidence, and to refer the case to an appropriate federal agency be denied. After a de novo review of the file and record, the court adopts the magistrate judge's report and-recommendation in its entirety.

I. Defendant's "Motion to Refer Matter to an Appropriate Federal Agency Under the Doctrine .of Primary Jurisdiction"

Defendant first objects to the magistrate judge's refusal to recommend that this criminal case be referred to the Social Security Administration pursuant to the doctrine of primary jurisdiction. The main thrust of defendant's objection is that "[t]he district court and/or a jury in a criminal case do not have the expertise to determine [Social Security) eligibility and fraud (Def.'s Mem. Law Supp. Obj. R&R at 2.) This argument has no merit.

In her report and recommendation, the' magistrate judge correctly explained the proper scope of the doctrine of. primary jurisdiction. See United States v. Gen. Dynamics Corp., 828 F.2d 1356, 1362 (9th Cir. 1987) (invocation of doctrine requires unresolved issue within context of comprehensive regulatory scheme requiring expertise or uniformity in. administration) The magistrate judge then correctly concluded that the doctrine does not apply to this case. Defendant's objection is therefore overruled.

II. Motion to Suppress Evidence

Defendant next objects to the magistrate judge's recommendation that her motion to suppress evidence be denied. Defendant's motion addresses three separate searches conducted pursuant to three separate search warrants. Defendant argues that all three warrants are unsupported by probable cause and insufficiently particular in their descriptions of the things to be seized.

A. Probable Cause

The magistrate judge appropriately determined that each of the three warrants was supported by probable cause. Magistrate Judge Mayeron correctly applied the "totality of the circumstances" test with respect to each warrant and correctly determined that the facts contained in each affidavit provided a substantial basis for the magistrate's probable cause determination. See United States v. Francis, 367 F.3d 805, 827 (8th Cir. 2004) (duty of court - reviewing warrant is to ensure that magistrate had substantial basis for probable cause determination); United States v. Rowland, 341 F.3d 774, 784 (8th Cir. 2004) ("Probable cause exists when, given the totality of the circumstances, a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place.").

Defendant's objection regarding lack of probable cause is overruled.

B. Particularity

The magistrate judge also properly evaluated the particularity of the warrants. The magistrate judge correctly noted that "a search warrant involving A scheme to defraud is 'sufficiently particular in its description of the items to be seized if it is as specific as the circumstances and nature of activity under investigation permit." United States v. Saunders, 957 F.2d 1488, 1491 (8th Cir. 1992) (quoting United States v. Kail, 804 F.2d 441, 445 (8th Cir. 1986)). Magistrate Judge Mayeron correctly applied this' standard of "practical accuracy," id. at 1491, to determine that, with the exception of item 14 of the Woodbury warrant, the warrants were sufficiently particular[1]. Further, with respect to item 14, the magistrate judge correctly held that the good faith

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[1] In its response to defendant's objections, the United States urges that item 14 is sufficiently particular because "[e]lectronic files are all stored together on a computer and must be seized together," presumably by seizing the whole computer. (Gov't's Resp. Def.'s Obj. R&R at 8.) This argument misses the mark. The magistrate judge did not recommend, and the court does not now hold, that, given sufficient probable cause, a properly-drafted warrant could not authorize seizure of an entire computer for later, off-premises search or analysis of its contents. Rather, the magistrate judge correctly determined that the Woodbury. warrant's authorization to seize "records," without any further limitation,. "allowe[d] for a 'general rummaging' through [defendant's]. files located on: computers and disks" and impermissibly' left to the discretion of the executing officer what files could be seized. (R&R at 26.)

exception of United States v. Leon, 4.68 U.S. 897 (1984), precludes suppression of any evidence seized under its terms. Defendant's objection is therefore overruled.

III. Motion for Return of Property

Finally, defendant objects to the magistrate judge's recommendation that her motion to have certain seized property returned to her be denied. Defendant argues that return of the property is necessary to guarantee her Sixth Amendment right to the effective assistance of counsel and her. Fifth Amendment right to due process of law. (Def.'s Mem. Law Supp. Obj. R&R at 10.)

Defendant's objection, however, must fail. A motion for return of property .is appropriately denied, when the government needs the property as evidence. United States v. Vanhorn, 296 F.3d 713, 719 (8th Cir. 2002). The magistrate judge correctly credited the government's representations regarding its need for the property. The magistrate judge's report and recommendation also endorsed a reasonable procedure for defendant to inspect and copy the documents in preparation of her defense, a procedure which the court now adopts. Defendant's objection is overruled. Therefore, after a de novo review of the file and record, the court adopts the report and recommendation of the magistrate judge [Docket No. 39] in its entirety. Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendant's. "Motion, Unless Otherwise Dismissed as a Matter of. Law, to Refer this Matter to an Appropriate Federal Agency Under the Doctrine of Primary Jurisdiction" [Docket No. 19] is denied.

2. Defendant's "Motion to Suppress Evidence Obtained as a Result of Search and Seizure" [Docket No. 20]

is denied.

3. Defendant's "Motion for Return of Items Seized" [Docket No. 28] is denied.

4. Defendant's "Supplemental Motion to Suppress" [Docket No. 30] is denied.

Dated: July 19, 2004

s/David S. Doty
David S. Doty, Judge
United States District Court

United States District Court
STATE AND DISTRICT OF MINNESOTA

In the Matter of the Search of
(Name, address or brief description of person or property to be searched)
SEARCH WARRANT
CASE NUMBER: 03MG-74 FLN

3360 Crestmoor Drive, Woodbury, MN 55125. The home appears to be a two-story yellow colored dwelling with an attached three-car garage that vehicles enter from the northwest or left side of the residence. There is an in-ground pool which has a fence around it in the back yard and the home's exterior is a combination of what appears to be wood siding, shakes and stone. The residence is one of three homes on a small "culdesac" on Crestmoor Drive.

TO: Special Agent Jane M. Lewis and any Authorized Officer of the United States

Affidavit(s) having been made before me by Jane M. Lewis who has reason to believe that [ ] on the person of or [X] on the premises known as (name, description and/or location)

3360 Crestmoor Drive, Woodbury, MN 55125. The home appears to be a two-story yellow colored dwelling with an attached three-car garage that vehicles enter from the northwest or left side of the residence. There is an in-ground pool which has a fence around it in the back yard and the home's exterior is a combination of what appears to be wood siding, shakes and stone. The residence is one of three homes on a small "culdesac" on Crestmoor Drive.

in the State and District of Minnesota there is now concealed

a certain person or property, namely (describe the person or property)
See attached list of items to be seized.

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before

_____
Date

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant Ind making the search (in the daytime — 6:00 A.M. to 10:00 P.M.)(at any time in the day or night as I find reasonable cause has been established) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to Judge Franklin L. Noel, United States Magistrate Judge, as required by law.

2/24/03 12:10 PM at Minneapolis, MN
Date and Time Issued City and State

Judge Franklin L. Noel,
United States Magistrate Judge s/_____
Name and Title of Judicial Officer Signature

ATTACHMENT A

ITEMS TO BE SEIZED

1. Bank Statements in the names of Denise Henderson; Kenneth Henderson; Crowning Moments Inc.; Queen Bear's Closet, Marketing That Works, Doctor's Wellness Centers.

2. Records of receipts including any journals or ledgers from the aforementioned entities.

3. Receipts of expenses from the aforementioned entities.

4. Invoices of supplies from the aforementioned entities.

5. Profit and loss statements from the aforementioned entities.

6. Correspondences with tax organizations, i.e., the Internal Revenue Service and the Minnesota Department of Revenue.

7. Monthly state sales tax forms.

8. Yearly tax returns.

9. Checking accounts and/or other bank account information pertaining to the aforementioned entities.

10. Records of employment including job applications, records of earnings, and IRS forms 940 and 941.

11. Business and/or corporate records as they pertain to the aforementioned entities.

12. Recor[illegible] loans from the aforementioned entities.

13. Other miscellaneous business records related to the aforementioned entities.

14. Records which appear on any and all computers which are located in the house, to include the hard drive and any disks which are located in the house.

15. Other evidence of Denise Henderson's active participation in business activity, including proceeds relating to those businesses.

Office of the Inspector General
Office of Investigations
Social Security Administration

INVENTORY FORM

Case Number: 5TF9900907F

Items Obtained By:
Search Warrant X Consent Search ___ Personal Effects ___ Vehicle ___
Search Incident to Arrest ___ Other (Specify): ___

Company Name: ___
Individual Name: Denise Henderson
Vehicle ID: YR. ___ Make: ___ Model: ___ Color: ___
Plate #: ___ VIN: ___
Date of Inventory: 02/25/03 Special Agent: Jane M. Lewis
Search Location: 3360 Crestmoor Drive, [redacted], MN 55125

ITEM No.	DESCRIPTION OF ITEMS
#1 from B	Sample of Checks, 5 Binders of Financial Info.
#2 from J	Check Books & Business Card
#3 from J	World Perks Statements
#4 from B	Misc. Records - Pageants, Financial
#5 from G	Letterhead Envelopes C.M. & Mrs. JA, E-mail Corrp., Dec notes, QBC Website Printouts, & Consignment Items.
#6 from G	Misc. Handwritten Notes, Pageant Docs., Magazines, Website Info., Contestant Lists.
#7 from M	Box Containing Shipping Invoice to Crowning Moments w/ Items Inc.
#8 from B	Misc. Paperwork, D.H. & Pageants, Marketing That Works
#9 from B	Misc. Records, Pay, credit, phone, pageants.
#10 from G	Med. Prescript., Acct. Info., Misc. Notes
#11 from B	Misc. Records - Financial
#12 from C	U.S. Postal Priority Mail Shipping Envelope (2)
#13 from C	Bank Correspondence, fin. Records, Day Planner, Cancelled Checks, Tax Records

Distribution of Copies: Case File
Agent File
Subject
Magistrate

Jane M Lewis

FORM OI-23 (Revised 11/20/00)

Office of the Inspector General
Office of Investigations
Social Security Administration

INVENTORY FORM

Case Number: STP99009077

Items Obtained By:
Search Warrant X Consent Search ___ Personal Effects ___ Vehicle ___
Search Incident to Arrest ___ Other (Specify): ___

Company Name: ___
Individual Name: Denise Henderson
Vehicle ID: YR. ___ Make: ___ Model: ___ Color: ___
Plate #: ___ VIN: ___
Date of Inventory: 02/25/03 Special Agent: Jane M. Lewis
Search Location: 3360 Crestmoor Drive, Woodbury, MN 55125

ITEM No.	DESCRIPTION OF ITEMS
#14 from P	Darius Cordell Papers
#15 from P	(3) VCR Tapes
#16 from B	Records - CMI, Misc.
#17 from P	Electronic Manuals
#18 from P	Pageant Tapes
#19 from L	Pageant & Business Related Docs.
#20 from F	D.W.C. Fin Docs, M.T.W., Bills & Statements
#21 from G	Teen IA, Mrs IA Dicount Coupons
#22 from B	Dr.s Diet Clinic Records, MTW Records, Misc.
#23 from L	1 CDR, 5 Floppy Discs
#24 from G	Pageant Marketing Docs., CMI, Bus. Cards, Contestant Apps., Purple Pageant Binders, photos
#25 from P	Pageant Booklets
#26 from B	Film from Camera on Desktop
#27 from B	Misc. Business Records & Lifestyle
#28 from G	Files Related to Businesses, Contracts, Agreements, Invoices, Sales Info.

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Agent File
Subject
Magistrate

Jane M Lewis

FORM OI-23 (Revised 11/20/00)

Office of the Inspector General
Office of Investigations
Social Security Administration

INVENTORY FORM

Case Number: STP99009077

Items Obtained By:
Search Warrant X Consent Search ___ Personal Effects ___ Vehicle ___
Search Incident to Arrest ___ Other (Specify): ___

Company Name: ___
Individual Name: Denise Henderson
Vehicle ID: YR. ___ Make: ___ Model: ___ Color: ___
Plate #: ___ VIN: ___
Date of Inventory: 02/25/03 Special Agent: Jane M. Lewis
Search Location: 3360 Crestmoor Drive, Woodbury, MN 55125

ITEM No.	DESCRIPTION OF ITEMS
#29 from L	Video Tapes
#30 from C	Financial Mail
#31 from F	Misc. Pageant Docs., Contestant Info., DWC Bank Statements
#32 from N	Misc. Bank Statements, Investment Statements, Bills
#33 from N	Account Statements, Misc. Bills
#34 from N	Misc. Bank Statements, 2000-2001 Tax Info.
#35 from J	Safe
#36 from G	Photos, Pageant Info.
#37 from I	VCR Tapes

Distribution of Copies: Case File
Agent File
Subject
Magistrate

Jane M Lewis

FORM OI-22 (Revised 11/20/00)

Office of the Inspector General
Office of Investigations
Social Security Administration

INVENTORY FORM

Case Number: STP9900907F

Items Obtained By:
Search Warrant X Consent Search ___ Personal Effects ___ Vehicle ___
Search Incident to Arrest ___ Other (Specify): ___

Company Name: ___
Individual Name: Denise Henderson
Vehicle ID: YR. ___ Make: ___ Model: ___ Color: ___
Plate #: ___ VIN: ___
Date of Inventory: 02/25/03 Special Agent: Jane M. Lewis
Search Location: 3360 Crestmoor Drive, Woodbury, MN 55125

ITEM No.	DESCRIPTION OF ITEMS
#38 from F	Computer CP - Pioneer Ser. # S0017134?2
#39 from B	CDs, Zip Discs
#40 from B	JVC Digital Video Camera Ser. # 084F0114
#41 from B	CD's, Manual
#42 from L	Computer CP - HP Pavilion 514n Ser. # MX24821090
#43 from G	Computer CP - VPR Matrix Ser. # F02 A01 1820 1210T
#44 from L	CD's
#45 from G	Computer CP - MSI Mainboard Ser. # None
#46 from B	Floppy Discs, Zip Discs, Floppy Disc Case
#47 from B	Computer CP - VPR Matrix Ser. # F02 A01 1820 1677T
#48 from B	CD Case, CD's, Floppy's

Distribution of Copies: Case File
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Subject
Magistrate

Jane M. Lewis

FORM OI-23 (Revised 11/20/00)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
Thomas F. Eagleton Court House
Room 24.329 VOICE (314) 244-2400
Michael E. Gans 111 S. 10th Street FAX (314) 244-2780
Clerk of Court St. Louis, Missouri 63102
www.ca8.uscourts.gov

September 19, 2005

Mr. Shawn Lee Pearson
MANSFIELD & TANICK
1700 Pillsbury Center South
220 S. Sixth Street
Minneapolis, MN 55402-4511

Re: 04-4151 United States vs. Denise M. Henderson

Dear Counsel:

Enclosed is a copy of an order entered today in the above case at the direction of the court.

(5009-010199)

Michael E. Gans
Clerk of Court

paw

Enclosure(s)

cc: Honorable David S. Doty, U.S. District Judge
Joseph Thomas Dixon III Denise Marie Henderson
Marshall H. Tanick
Steven H. Silton
Lori Fink, Court Reporter
West Publishing
Lois Law
Richard Sletten, Clerk

District Court/Agency Case Number(s): CR03-437 DSD/JSM

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-4151

United States of America,

Appellee,

vs. Order Denying Petition for Rehearing and for Rehearing En Banc

Denise Marie Henderson,

Appellant.

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

September 19, 2005

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals. Eighth Circuit

SOCIAL SECURITY ADMINISTRATION

Office of Hearings and Appeals
330 Second Avenue South, Ste. 650
Minneapolis, Minnesota 55401
Telephone: (612) 348-1230
Date:

Denise M. Henderson
12425 - 53 St N
Stillwater, MN 55082

NOTICE OF DECISION — FULLY FAVORABLE

I have made the enclosed decision in your case. Please read this notice and the decision carefully.

This Decision Is Fully Favorable To You

Another office will process the decision and send you a letter about your benefits. Your local Social Security office or another office may first ask you for more information. If you do not hear anything for 60 days, contact your local office.

The Appeals Council Hay Review The Decision On Its Own

The Appeals Council may decide to review my decision even though you do not ask it to do so. To do that, the Council must mail you a notice about its review within 60 days from the date shown above. Review at the Council's own motion could make the decision less favorable or unfavorable to you.

If You Disagree With The Decision

If you believe my decision is not fully favorable to you, or if you disagree with it for any reason, you may file an appeal with the Appeals Council.

Haw To File An Appeal

To file an appeal you or your representative must request the Appeals Council to review the decision. You must make the request in writing. You may use our Request for Review form, HA-520, or write a letter. You may file your request at any local Social Security office or a hearing office. You may also mail your request right to the Appeals Council, Office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church, VA 22041-3255. Please put the Social Security number shown above on any appeal you file.

Time To File An Appeal

To file an appeal, you must file your request for review within GO days from the date you get this notice.

The Appeals Council assumes you got the notice 5 days after the date shown above unless you show you did not get it within the 5-day period. The Council will dismiss a late request unless you show you had a good reason for not filing it on time.

Time To Submit New Evidence

You should submit any' new evidence you wish to the Appeals Council to consider with your request for review.

How An Appeal Works

Our regulations state the rules the Appeals Council applies to decide when and how to review a case. These rules appear in the Code of Federal Regulations, Title 20, Chapter III, Part 404, Subpart J.

If you file an appeal, the Council will consider all of my decision, even the parts with which you agree. The Council may review your case for any reason. It will review your case if one of the reasons for review listed in our regulations exists. Section 404.970 of the regulations lists these reasons.

Requesting review places the entire record of your case before the Council. Review can make any part of my decision more or less favorable or unfavorable to you.

On review, the Council may itself consider the issues and decide your case. The Council may also send it back to an Administrative Law Judge for a new decision.

If No Appeal And No Appeals Council Review

If you do not appeal and the Council does not review my decision on its own motion, you will not have a right to court review. My decision will be a final decision that can be changed only under special rules.

If You Have Any Questions

If you have any questions, you may call, write or visit any Social Security office. If you visit an office, please bring this notice and decision with you. The

telephone number of the local office that serves your area is (840) 772-1213. Its address is 316 North Robert Street, St. Paul, MN, 55101.

David A. Clapp
Administrative Law Judge

Enclosures

cc: William P. Kaszynski
E1320 1st NAT'L BANK BLDG
ST PAUL, MN 55101

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

ORDER OF ADMINISTRATIVE LAW JUDGE

IN THE CASE OF	CLAIM FOR
Denise M. Henderson	Period of Disability and Disability Insurance Benefits
	298-68-0939
(Wage Earner)	(Social Security Number)

I approve the fee agreement between the claimant and her representative subject to the condition that the claim results in past-due benefits.

My determination is limited to whether the fee agreement meets the statutory conditions for approval and is not otherwise excepted. I neither approve nor disapprove any other aspect of the fee agreement.

_____
David A. Clapp
Administrative Law Judge

_____
Date

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF	CLAIM FOR Period of Disability and Disability Insurance Benefits
	298-68-0939
(Wage Earner)	(Social Security Number)

PROCEDURAL HISTORY

This claim is before the undersigned-Administrative Law Judge pursuant to the claimant's timely May 12, 1998 hearing request. The claimant, Denise M. Henderson, protectively filed an application for Title II disability insurance benefits on April 15, 1997. She asserts disability beginning December 19, 1995 due to the residuals from a motor vehicle accident including chronic pain, vertigo, right carpal tunnel syndrome and poor mandibular joint disorder and migraine headaches. (Exhibits 2B, 4B, 1E, 4E) Her application was denied initially on January 7, 1998 and upon reconsideration on April 20, 1998.

After due notice a hearing was held before the undersigned on January 4, 1999 in Minneapolis, Minnesota. The claimant appeared and testified. She was represented by Attorney William P. Kaszynski. John LaBree, M.D., testified as an impartial medical expert. Barbara Wilson-Jones testified as an impartial vocational expert.

ISSUES

The general issue presented by the claim is whether the claimant is entitled to a period of disability and disability

insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act. The specific issues are whether the claimant is under a disability, as defined in the Social Security Act, and, if so, when such disability commenced and the duration thereof; and whether the disability insured status requirements of the Act are met for the purpose of entitlement.

CONCLUSION

After careful consideration of the entire record the undersigned finds that the claimant has been disabled since December 19, 1995 as other work does not exist in significant numbers that the claimant can perform due to her severe impairments.

EVALUATION OF THE EVIDENCE

Ms. Henderson was fully insured for Title II benefits on December 19, 1995 and through at least December 31, 2000. (Exhibit 5D)

Ms. Henderson was born on January 30, 1960 and is a 39 year old "younger individual". She has a Master's Degree in Business Communication. (Exhibit 1E)

The Social Security regulations require the Administrative Law Judge to apply a five-step sequential evaluation process in determining whether the claimant is disabled. 20 C.F.R. §404.1520. Disability is defined as the inability to do any substantial gainful activity by reason of any medically determinable physical -or mental impairment which can be expected to result in death, or which has lasted, or can be expected to last for a continuous period of not less than 12 months.

This process begins with a determination as to whether the claimant has engaged in substantial gainful activity, as defined in the regulations, at any time since- the alleged onset date of disability. The ability to earn $500.00 a month creates the rebuttable presumption the claimant has engaged in substantial gainful activity. Absent evidence to the contrary, the undersigned finds the claimant has not engaged in substantial gainful activity since the alleged onset date.

The next step in the sequential evaluation process requires a determination as to whether the claimant is subject to any severe physical or mental impairment. A severe impairment is defined as one that significantly limits the individual's physical or mental ability to meet the basic demands of work activity. 20 C.F.R. §§404.1520(c) and 404.1521.

According to the medical record the claimant was involved in a car accident on December 19, 1995. She initiated care with her primary care physician at the North St. Paul Clinic and was begun on Naprosyn. She then began care with John Benassi, D.C. on December 27, 1995 which continues. Dr. Benassi diagnosed and treated the claimant for chronic sprain/strain syndrome producing persistent neurological dysfunction in the extremities, thoracic outlet, carpal tunnel syndrome, sciatic radiculitis, loss of concentration and severe vertigo. (Exhibit 6F, p. 7)

December 29, 1995 MRI s showed degenerative disc disease at L5-S1 with herniation and moderate hypertrophic overgrowth of the left L5-S1 facet producing moderate severe compression of the transverse left S-1 nerve root. MRI's showed degenerative disc disease at C34, C5-6 and C6-7 with mild right spinal stenosis at C6-7 and C34 with degenerative joint disease in the (Exhibit 6F, pp. 13 - 14)

On January 2, 1996 the claimant saw Keith V. Chilgren, M.D.

who noted a well-developed well-nourished alert woman who was 5'6" 134 pounds. Blood pressure was 114/77. Pupils were equal and reactive, Cervical musculature was tender and range of motion was painful. Flexion and extension of the neck to 25 and 30 degrees and rotation to 45 degrees before experiencing more discomfort. Tinel sign was positive on the right but not left. Sensation was intact in the lower extremities and deep tendon reflexes were symmetrical in the extremities. Motor strength appeared symmetrically deep creased in the upper extremities. There was good strength and tone in the lower extremities. Thoracic musculature was tender and the lumbosacral spine wa tender with pain on straight leg raising, 25 to 30 degrees bilaterally. Dr. Chilgren diagnosed cervical myofascial strain with headaches, thoracic inyofascial strain, lurubosacral strain, right carpal tunnel syndrome. He restricted her to avoiding heavier work at home and continued her on Naprosyn. He began her on Verelan for treatment and prevention of headaches and Robaxin and referred her- to a neurologist. (Exhibit 1F, pp. 7 - 8) On February 6, 1996 Dr. Chilgren noted that the claimant had apparently seen a neurologist, Dr. Noran, and was wearing a wrist splint. She reported no relief with Verelan and this was then changed to Procardia and he began her on Zantac. (Exhibit 1F, pp. 6, 7)

The claimant also started care with Roy Z. Hakala, DDS on February 20, 1996 for treatment of temporomandibular joint disorder and headaches. (Exhibit 5F) In March 1996 Dr. Chilgren discontinued. Procardia and began her on Imitrex. (Exhibit 1F, p. 6)

On April 23, 1996 Neurologist Steven Noran, MD noted that the claimant had developed an inner ear infection which was treated by her primary care physician. She had vertigo with position changes and was on Antivert. She reported wearing a TMJ mouthpiece. He noted she wore a splint on her wrists 60% of the time. Dr. Noran noted a well-developed woman

who was not in acute distress and was alert, pleasant, cooperative and coherent. Her neck was tender in the upper spine and trapezius muscles bilaterally with spasm. There was no cervical paraspinal muscle spasm or tenderness. Cervical range of motion showed right lateral flexion more limited than left. Forward flexion and extension were moderately limited as well as bilateral rotation. Reflexes were symmetric in the upper extremities. There was no normal motor strength and tone in the upper extremities. There was decreased sensation to pinprick in the right third through fifth digits in the left first through fifth digits.. She had positive Tinel sign on the right greater than left and positive Phalen's sign bilaterally. She was tender laterally over the left shoulder but had full range of motion of both shoulders. Low back examination showed tenderness in the lower lumbosacral spine and in the paraspinal lumbar muscles and SI joint without spasm. Moderate limitation was noted in motion but gait was normal. She could heel and toe walk and reflexes were symmetric in the lower-extremities. She had normal motor strength and tone in the lower extremities and decreased sensation to pinprick in the right great toe and left great toe but otherwise normal sensation. Straight leg raise was positive bilaterally at 60 degrees. He diagnosed carpal tunnel syndrome bilaterally which was electrodiagnostically proven on the right and cervical degenerative disc disease with cervical strain/sprain syndrome and changes to the cervical strain/sprain syndrome with multiple level cervical disc bulges, cervicogenic headaches and lumbosacral-strain/sprain syndrome with lumbar disc herniation at L5-S1 to the left. (Exhibit 4F, pp. 13 - 15)

Dr. Chilgren saw the claimant on May 9, 1996 noting recurrent dizziness especially when twisting or turning her neck and changing head position. He noted that she moved carefully. Pupils were equal and reactive and cervical musculature was tender with painful range of motion. Deep

tendon reflexes were symmetrical. She had a positive Tinel on the right but not left. Motor strength was symmetrical in the upper extremities but thoracic musculature was tender. Lumbosacral spine was tender with pain on straight leg raising bilaterally at 45 to 50 degrees. Sensation, motor, tone and deep tendon reflexes were normal. He diagnosed cervical myofascial strain with bulging discs at C3-4, C5-6 and C6-7 with headaches and a thoracic myofascial strain and lumbosacral strain with herniation at L5-S1 producing moderately severe compression of a transversing left S-1 nerve root and right carpal tunnel syndrome. He advised her to avoid heavier work and continued her on Imitrex, Naprosyn, Robaxin and Zantac. (Exhibit 1F, p. 4)

On July 24, 1996 Dr. Noran noted swelling and tenderness of the left SI joint with positive Phalen and Tinel sign over the median nerve on the right side. Neck motion was significantly limited and low back examination revealed swelling and tenderness of the left SI joint and mild restriction in range of motion. He noted symptoms of possible deQuervain's tenosynovitis on the right. He recommended a therapeutic block of the SI joint or left L5-S1 facet and began her on Nortriptyline. (Exhibit 4F, pp. 11, 12)

On February 24, 1997 Dr. Noran noted that the claimant appeared very uncomfortable. He was unable to induce nystagmus but could induce vertigo with simply closing her eyes and moving her head. There were no other cranial nerve abnormalities. Tuning Fork Test was normal and tympanic membranes appeared normal. Carotid pulses were equal without bruits. Motor exam was normal without drift and there were no superficial reflexes. Sensory and cerebellar exams were normal. Neck examination showed mild to moderate restriction and range of motion and tenderness over the paraspinous cervical muscles and tenderness over the radial head on the right arm and decreased pain with

compression around the arm. Right Phalen and Tinel was positive over the median nerve. He diagnosed acute vertigo following increasing headaches rule out intercranial lesion and rule out benign posturing vertigo and vestibular function. He also noted right lateral epicondylitis. He ordered an MRI head scan which was normal (Exhibit 4F, pp. 9, 16). Dr.-Noran subsequently referred the claimant to the Abbott-Northwest Balance Clinic and began her on valium. (Exhibit 4F, p. 6)

On March 26, 1997 the claimant saw Jane Gilbert, R.N., M.A. at the Abbott-Northwest Balance Clinic. Audiological assessment found normal hearing but ENG testing including bithermal irrigation showed a unilateral weakness 29% on the right and low gain of stibulo-occular reflex by rotation. She recommended vestibular rehabilitation. (Exhibit 2F)

Dr. Noran saw the claimant on May 6, 1997 noting mild spasm in the paraspinous cervical muscle and upper medial trapezius muscles, mild restriction in neck motion. He was unable to induce vertigo and nystagmus. Low back was tender in the SI joints left greater than right with mild restriction and range of motion of the low back. He diagnosed positional vertigo following closed head injury consistent with vestibular system dysfunction, right carpal tunnel syndrome but no evidence of hand weakness. He noted a low back injury and lumbar herniation, cervical myoligamentous strain/sprain syndrome and improved right lateral epicondylitis. He sent the claimant back to the Balance Lab for rehabilitation and exercises. (Exhibit 4F, p. 2)

On December 5, 1997 she saw Ward R. Jankus, M.D. for a Social Security consultative physical examination who noted a pleasant, cooperative neatly-groomed individual who provided coherent, reliable history. She held her neck in a fairly rigid posture and avoided rotation or forward

flexion/extensian. Range of motion was limited and she had spasm in the cervical paraspinals and upper trapezius.and lumbar paraspinal. She had trigger points scattered throughout the cervical paraspinals, upper trapezius, Romboid, lumbar paraspinals and proximal buttock musculature. Extremities were well profused without gross deformities. Range of motion was intact at the wrists, elbows and fingers. She had shoulder discomfort with elevation past 90 degrees with tightness in the interscapular muscle regions posteriorally. She had low back discomfort with hip range of motion testing but no bony limits and range of motion. There was no crepitus of any joint or erythema or effusion, Right wrist was tender to palpation and the right lateral epicondyle also had tender points. Cranial nerves were-intact. Visual fields were full and extraocular movements were intact. Muscle bulk was symmetric in the extremities and strength was graded at 5/-5 limited primarily by discomfort with strength the shoulder and grip strength testing at the right as well as hip flexors bilaterally. Pinprick was mildly diminished distally in the right hand not fitting any particular dermatomal or peripheral nerve distribution and there was mildly decreased pinprick in the left lower extremity diffusely as compared to the right. Gait was smooth. She appeared generally stiff and slow for the first few steps. She could walk on heels and without weakness but there was a mild tendency to lose balance with tandem gait. Romberg testing revealed a fair amount of sway but no complete loss of balance. She had evidence of dizziness and lightheadedness when changing from sitting to supine position and vice versa. Light grasping and manipulating were intact.

Dr. Jankus diagnosed cervical scapular/lumbar strain/sprain, chronic myofascial pain syndrome, headaches probably secondary to myofascial pain syndrome, left L5-S1 herniation, aggravation of degenerative spinal changes, TMJ, and right upper extremity pain probably secondary to

myofascial pain syndrome with lateral epicondylitis and mild carpal tunnel syndrome.

Dr. Jankus opined that based on documented findings the claimant could not tolerate full-time sitting type work such as she had done previously. He noted reports that she currently spent the majority of an eight hour period (six hours) in a standing position which is probably what she would have to do from a work standpoint. Sitting capacity was estimated at two of eight hours with breaks every ten to twenty minutes to stand up and move around. She was not able to do repetitive bending, squatting or kneeling activities. Lifting and carrying was estimated at five to ten pounds on a fairly occasional basis. He limited repetitive aggressive pushing and pulling with the upper extremities or repetitive overhead activities. She should, avoid unprotected heights and ladders and opined she would have difficulty holding her head in a flexed or extended posture for prolonged periods. He noted difficulty with prolonged firm grasping, pinching or repetitive twisting at the wrist level (Exhibit 7F)

The claimant returned to Beth Oemichen, RPA at the Noran Clinic on August 11, 1998 who noted that she ambulated without difficulty. Next examination showed a mild restriction in mobility but some spasm and tenderness in the cervical paraspinal muscles and Tupper trapezius. -She was diffusely tender throughout the mid and low back and had several tender areas in the upper and lower extremities around the elbows, over the sternum, over the medial knee and over the SI joints: Range of motion of the low back was -pain- was noted on end range. Motor strength was but not particularly strong. Reflexes were 2+ and sensory exam showed global decrease over the right arm relative to the left. She had a positive Tinel and negative Phalen's with negative thoracic outlet findings bilaterally. There were no signs of shoulder impingement or nerve tension or radiculopathy in the lower

extremities. There were no long track findings. Cranial nerves were grossly intact and Romberg and tandem walking were normal. The impression was headaches with a prior history of migraines with a new rebound component, ongoing cervical thoracic and lumbar sprain/strain components with mild areas of degeneration in the back and an area of herniated disc but no signs of nerve tension or radiculopathy, ongoing dizziness, question cervical component and ongoing right upper extremity symptoms, TMJ, and a fibromyalgia type picture. She began the claimant on Amitriptyline and Imitrex nasal spray, encouraged pool therapy and follow-up with her TMJ specialist. She noted that balance retraining previously recommended had not been conducted due to insurance problems. (Exhibit 14F, pp. 6, 5)

On September 16, 1998 Beth Oemichen noted ambulation without difficulty. Motor strength was intact in the extremities and reflexes were 2+. Tinel was positive on the right but not left. Phalen and Allan's Test were negative. There were no nerve tension or radiculopathy in the lower-extremities although she had spasm and reduced motion in the heck and back. Her impression was decreasing headaches on Elavil, ongoing cervical, thoracic and lumbar strain/sprains without nerve tension or radiculopathy, ongoing dizziness, ongoing right upper extremity symptoms with a positive EMG for carpal tunnel syndrome and infrequent or irregular use of wrist splints, TMJ with sporadic use of splint and inability to pursue pool conditioning. (Exhibit 14F, pp. 8, 9)

The undersigned finds the claimant severely impaired by cervical thoracic and lumbar pain due to strain/sprains and degenerative disc disease, right-sided carpal tunnel syndrome and vertigo.

To determine the severity .of the claimant's impairments the undersigned arranged for John LaBree, M.D., to appear and

testify in the capacity of an impartial medical expert. Dr. LaBree testified and the undersigned claimant was subject to the aforementioned severe impairments she does not have an impairment or combination of impairments which met or equalled the criteria of any listed impairment.

The-remaining issue-in the sequential evaluation is whether Ms-Henderson has a residual functional capacity which permits her to perform her relevant past work or any other work existing in significant numbers in the national economy. Determination of the claimant's residual functional capacity requires evaluation of the medical records and assessment of the claimant's subjective complaints under Social Security Ruling 96-7p, 20 C.F.R. §§ 404.1529(c) and Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984).

Polaski provides that because symptoms sometimes suggest a greater severity of impairment than can be shown by objective medical evidence alone, careful consideration must be given to any available information about symptoms. The credibility assessment must describe the relationship between the medically determinable impairment(s) and the conclusions regarding functioning which have been derived from the evidence, The discussion must include why the following are, or are not, reasonably consistent with the medical and other evidence: 1) daily activities, 2) location, duration, frequency, and intensity of the symptoms, 3) precipitating and aggravating factors, 4) medications and side effects, 5) other treatment, 6) other measures to relieve symptoms, and 7) other factors concerning functional limitations. Subjective complaints may be discounted if there are significant inconsistencies in the record as a whole. Polaski v. Heckler, 751 F.2d 943, 948 (8th Cir.) (subsequent history omitted).

Ms. Henderson asserts she is disabled due to the combination of her physical impairments. She has migraines four to five

days per week which last nearly all day which are exacerbated and brought on by lifting such as a gallon of milk. She takes multiple medications including Imitrex which makes her drowsy and Atenolol which is of little help. She has a numb right hand and arm and pain down her right shoulder which is aggravated by use. She has low back pain which radiates to her buttock and right leg and also a burning sensation sown her low back. She can not sit for more than twenty minutes. She has frequent urination. She has vertigo with position changes and has lockjaw. These are all a result of a motor vehicle accident on December 19, 1995 in which she was broad-sided and spun around and had a double impact. She has been treated by chiropractors, neurologists and TMJ specialists. She can not walk more than ten minutes and is unable to sleep for more than two hours cycle. She has poor concentration and memory.

The undersigned has considered the claimant's subjective allegations and finds her a totally credible witness.

The undersigned finds the claimant limited to less than sedentary exertional levels. She can not lift ten pounds and can not lift from the floor or waist level. She must alternate her positions and can not sit more than two hours per day or remain on her feet more than six hours out of eight. She must change positions every ten to fifteen minutes as needed. She can do little climbing. She can not balance, push or pull, work at heights or near dangerous machinery or work with vibrations. She is limited to only unskilled work due to poor concentration and memory and will miss at least one day of work per week.

The undersigned adopts the limitations offered in testimony by Dr. LaBree, the only medical source to have had access to the entire medical record as well as claimant's subjective testimony. The undersigned affords this more weight than the

opinion of non-examining State Agency medical consultants.

The undersigned notes vestibular function deficits and accordingly safety limitations as well as limitations on balancing heights and climbing unafforded. The undersigned notes diagnostic evidence of a herniated disc .in the lumbar spine and therefore limits exertional lifting, pushing, pulling and exposure to vibrations and this warrants limitations on static positions. Noting spinal stenosis in the cervical spine, limitations on vibration, pushing, pulling ate warranted. The combination of claimant's impairments produce concentration and memory deficits limiting her to unskilled work and providing for frequent unscheduled absences.

The claimant's pattern of treatment and report of symptoms supports disability. The claimant reports debilitating pain and minimal activities. She has had neurological evaluation and has been evaluated by an orthopedic specialist at St. Anthony Orthopedists, Dr. Walsh. The claimant was evaluated by a Physical Medicine and Rehabilitation Consultant, Dr. Dykstra at the University of Minnesota although the undersigned again notes that these records have not been made available. She has been treated with medications and physical therapy.

The claimant's use of medication also supports these limitations. The claimant uses Imitrex which causes severe limitations which would result in absences even in excess of the claimant's pain related limitations and which by themselves would likely preclude competitive work or even sheltered employment and which, without a change in medication regimen, will likely preclude any medical improvement. (Exhibits 1E, 4E) She used multiple over-the-counter medication, muscle relaxants and anti-inflammatory medications.

The claimant's activities of daily living indicate a restricted

lifestyle. She reports having to hire out all of her household activities. (Exhibit 8F) Her doctors note severe reduction in activities (Exhibit 13F, p. 5)

Finally, the undersigned has considered claimant's subjective employment history in evaluating the subjective complaints. The undersigned notes a solid employment history with responsibility for the care and maintenance of her marketing business. The undersigned views this factor in the most favorable manner noting absolutely no economic disincentive for a return to work. She has clearly established motivation for work activity and to apply her educational background.

Having determined the claimant's residual functional capacity, it is next necessary to consider whether Ms. Henderson is able to return to her past work or perform any other work existing in significant numbers in the national economy. Since these issues involve vocational considerations, the undersigned arranged for Barbara Wilson-Jones to testify as a neutral vocational expert.

The undersigned finds the claimant has skilled past relevant work as a consultant, sales/marketing manager, and sales promoter/manager but that this work does not provide transferable vocational skills to her current residual functional capacity.

The undersigned notes vocational testimony and finds the claimant cannot perform her past relevant work. Claimant has met his burden of proof and established an inability to perform his past relevant work. The burden shifts to the government to show any other work that claimant can perform given his age, education, relevant work history, and residual functional capacity.

The undersigned asked the vocational expert to assume an

individual of the claimant's age, education, past work history and residual functional capacity. When asked by the undersigned whether this individual could perform any of the claimant's past relevant work the vocational expert testified in the negative. The undersigned thus finds that claimant cannot perform any other work which exists in significant numbers in the regional or national economy. She has been disabled since December 1995.

FINDINGS

After careful consideration of the entire record the Administrative Law Judge makes the following findings:

1. The claimant was fully insured for Title II benefits on December 1995 and she meets those requirements through December 31, 2000.

2. The claimant is a younger individual.

3. The claimant has a Master's Degree in Business Communication.

4. The claimant has not engaged in substantial gainful activity since December 1995.

5. The claimant has severe cervical thoracic and lumbar pain due to strain/sprains and degenerative disc disease, right-sided carpal tunnel syndrome and vertigo, but does not have impairments which meet or equal individually or cumulatively the requirements of an impairment contained in Appendix 1, Subpart P, Part 404.

6. The claimant's subjective allegations are fully credible.

7. The claimant has skilled past relevant work as a consultant, sales and marketing manager and sales promoter/manager which do not provide transferable. vocational skills to her residual functional capacity.

8. Considering her age, education, past work history and residual functional capacity, claimant cannot perform work which exists in significant numbers in the regional or national economy.

9. The claimant has been disabled since December 19, 1995.

DECISION

It is the decision of the Administrative Law Judge that, based on the application filed on April 15, 1997, the claimant is entitled to a period of disability commencing, and to disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

/s/
David A. Clapp
Administrative Law Judge

February24, 1999
Date